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### James Wilson and the Drafting of the Constitution

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## ARTICLES

### JAMES WILSON AND THE DRAFTING OF THE CONSTITUTION

*William Ewald\**

Scholars of the Constitutional Convention of 1787 have long recognized the importance of James Wilson to the framing of the Constitution. He is generally acknowledged to have been one of its principal architects, second in importance only to Madison. This view of Wilson was stated in 1913 by the great scholar of the Convention, Max Farrand, who in an influential analysis called him "Madison's ablest supporter,"<sup>1</sup> and Farrand's view has been widely accepted by historians of the Convention ever since. However, perhaps partly because of this "ablest supporter" characterization, Wilson has tended to be viewed as an adjunct to Madison, his thought subsumed under the thought of his great colleague. The Constitution, especially in popular accounts, is treated as "Mr. Madison's Constitution,"<sup>2</sup> and Wilson is reduced to a mere tactical follower. It is difficult to find a connected account of Wilson's role at the Convention, and, in particular, a detailed analysis of exactly what he was attempting to accomplish and of his similarities and differences from Madison. As I argue below, however, although Wilson and Madison were natural allies, and although they frequently voted together, their similar voting patterns mask the fact that their underlying reasons were often quite different. Wilson, indeed, possessed a constitutional theory comparable in sophistication to those of Madison, Jefferson, or Hamilton, and it deserves to be disentangled from the views of his better-known colleagues. The principal source for his theoretical ideas is the *Lectures on Law* he delivered at the College of Philadelphia (later the

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1 MAX FARRAND, *THE FRAMING OF THE CONSTITUTION* 198 (1913). The full Farrand quotation is discussed below. See *infra* text accompanying note 34. Farrand's remarks begin, "Second to Madison and almost on a par with him was James Wilson," *id.* at 197; half a century later, Clinton Rossiter scarcely varied Farrand's words, concluding, "Second only to Madison—and an honorable second—was [James Wilson]." CLINTON ROSSITER, *1787: THE GRAND CONVENTION* 247–48 (1966).

2 FRANK DONOVAN, *MR. MADISON'S CONSTITUTION* (1965); see also *infra* note 37 (discussing Madison's reputation as "the Father of the Constitution").

University of Pennsylvania) in the early 1790s.<sup>3</sup> Because Wilson's views are likely to have evolved both during the intense arguments of the Convention itself and then in the national debate over ratification that followed, I shall in this article set aside all of Wilson's writings after the close of the Convention, and in particular shall not rely upon the *Lectures* to interpret his actions at the Convention retrospectively. No doubt there are continuities between his earlier and his later thought, but for the sake of analytical clarity it is important to start by attempting to obtain as accurate a view as possible of the Convention as it would have appeared to Wilson at the time and to defer a discussion of the *Lectures* to another article. My aim here is thus a restricted one: to obtain a clear understanding of precisely what Wilson did between May and September of 1787 and, in particular, of the contrasts and similarities between his arguments and those of James Madison.

James Wilson is not nearly as well known as Madison or Jefferson or Hamilton, and indeed, relative to the magnitude of his accomplishments, he has a good claim to be the most neglected of the major American founders. For that reason it will perhaps be best to begin by recounting some of the central facts of his life, with an emphasis on the events that did most to shape his thought on constitutional government.

## 1. BIOGRAPHICAL BACKGROUND

James Wilson was born in 1742 in Fifeshire in the Scottish lowlands.<sup>4</sup> His father was a yeoman farmer, a strict Calvinist, who destined his son for a ministry in the Church of Scotland. Wilson was sent first to the local grammar school (where he learned the rudiments of Latin and Greek) and then to the nearby University of St. Andrews. For the next four years he studied Latin, Greek, mathematics, logic, and moral and political philosophy, and he then spent a fifth year studying theology. It is important to recognize that the Scottish universities were at this time far in advance of Oxford or Cambridge, to say nothing of the education available in the American colonies. The Scottish Enlightenment, associated with Adam Smith, David Hume, Thomas Reid, Lord Kames, Dugald Stewart, Francis

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3 1 THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. (Bird Wilson ed., 1804), reprinted in 1 THE WORKS OF JAMES WILSON 53 (Robert Green McCloskey ed., 1967).

4 The basic biographical facts about Wilson's life are taken from CHARLES PAGE SMITH, JAMES WILSON: FOUNDING FATHER: 1742-1798 (1956).

Hutcheson, and numerous lesser figures, was in full bloom.<sup>5</sup> Although the center of the movement was located at Edinburgh, the influence of these thinkers was strong at St. Andrews, and Wilson was steeped in their works, as well as in the philosophical writings of Locke, Berkeley, and Rousseau (who had famously spent time in Edinburgh with David Hume).<sup>6</sup>

After the death of his father, he decided to emigrate to America. His ship landed in New York in the fall of 1765. Parliament had enacted the Stamp Act, imposing taxes on the American colonies, in March, while he was still in Britain; when he landed, the Stamp Act Congress was meeting in New York to coordinate the American resistance. He thus arrived in the midst of the crisis that was to culminate in the American Revolution. It is worthwhile to stress that, unlike most of the eventual drafters of the Constitution, he was an adult immigrant to America. His family had not lived for generations in Virginia or Massachusetts or New York; and this fact, combined with his Scottish education, may have predisposed him (like the other conspicuous immigrant, Alexander Hamilton) to think nationally at

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<sup>5</sup> For recent studies, see generally JAMES BUCHAN, *CROWDED WITH GENIUS: THE SCOTTISH ENLIGHTENMENT: EDINBURGH'S MOMENT OF THE MIND* (2003); *THE CAMBRIDGE COMPANION TO THE SCOTTISH ENLIGHTENMENT* (Alexander Broadie ed., 2003); A HOTBED OF GENIUS: *THE SCOTTISH ENLIGHTENMENT, 1730-1790* (David Daiches et al. eds., 1986).

<sup>6</sup> The importance of the Scottish thinkers to the American founding was first clearly pointed out by Douglass Adair. See, e.g., Douglass Adair, "That Politics May Be Reduced to a Science": *David Hume, James Madison, and the Tenth Federalist*, 20 HUNTINGTON LIBR. Q. 343 (1957) (describing the influence Hume's work had on James Madison's thoughts and writings). Geoffrey Marshall independently called attention to Madison's direct borrowing of portions of *The Federalist No. 10* from Hume. See Geoffrey Marshall, *David Hume and Political Scepticism*, 4 PHIL. Q. 247, 255-56 (1954) (making side-by-side comparisons of Hume's and Madison's statements). Adair's theme of Scottish influence was subsequently elaborated upon at length by Garry Wills. See generally GARRY WILLS, *EXPLAINING AMERICA: THE FEDERALIST* (1981); GARRY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* (1978) [hereinafter WILLS, *INVENTING AMERICA*]. Wills has often been accused by historians of exaggerating Adair's point and, in particular, of underplaying the influence of John Locke. However, his general point concerning the existence and importance of the influence of the Scottish Enlightenment thinkers seems incontestable. Apart from the general question of Scottish influence on the founders, Wilson in particular was one of the most highly educated of the Framers of the Constitution and was especially indebted to thinkers such as Reid, whom he had first studied at St. Andrews. Although in this Article I shall not be exploring the intellectual sources of Wilson's constitutional thought, I note in passing that his *Lectures in Law* reveal that he had read extraordinarily widely in the political theory of the Enlightenment. Indeed, it is difficult to find works mentioned by Madison or Jefferson that were unknown to Wilson; but not hard to find works relied upon by Wilson in his *Lectures* that neither Madison nor Jefferson appear to have read. But this is a lengthy topic, and a full treatment of Wilson's reading is best postponed to another article.

the 1787 Convention rather than in terms of the interests of particular localities.

He did not linger in New York, but proceeded immediately to Philadelphia. Armed with his training from St. Andrews, he quickly obtained an academic post and taught Latin for a year in Benjamin Franklin's College of Philadelphia before deciding to pursue a career in law. In 1766 he apprenticed himself to John Dickinson, one of the most prominent lawyers in the American colonies. This was a fateful choice: Dickinson was destined to become a major figure in the Revolution, and his path crossed repeatedly with Wilson's over the next thirty years. Wilson studied intensively and completed his training in little over a year. His notebooks from this period survive, and they show that much of his reading was in subjects that would today be classified as political philosophy—Hume, Montesquieu, Algernon Sidney, Adam Ferguson, and the thinkers of the continental natural-law tradition. In 1767 he moved to the frontier town of Reading, Pennsylvania, where he opened his own law practice. At about this time Dickinson began to publish his *Letters from a Farmer in Pennsylvania*, which appeared at intervals between 1767 and 1768.<sup>7</sup> The *Letters* are widely considered the most influential single piece of American political pamphleteering in the years before the outbreak of the Revolution.<sup>8</sup> It is unclear whether Dickinson specifically discussed their content with Wilson, who had already left his apprenticeship; but Wilson certainly read the *Letters* as they appeared in the newspapers. Inspired by his mentor's success, Wilson himself wrote a political pamphlet—a precocious essay, most likely composed before 1770, denying the authority of Parliament to legislate for the colonies in any matter whatsoever.<sup>9</sup> Wilson did not publish this pamphlet until 1774, when it immediately established him, at the age of thirty-two, as one of the leading political thinkers of the Revolution. In particular, it attracted the attention of Thomas Jefferson, who copied extracts into his *Commonplace Book*, and who may have been influenced by it in

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7 JOHN DICKINSON, LETTERS FROM A FARMER IN PENNSYLVANIA TO THE INHABITANTS OF THE BRITISH COLONIES, *reprinted in* EMPIRE AND NATION (Forrest McDonald ed., Indianapolis, Liberty Fund 1999).

8 Forrest McDonald, for example, notes that "[t]heir impact and their circulation were unapproached by any publication of the revolutionary period except Thomas Paine's *Common Sense*." Forrest McDonald, *Introduction to* EMPIRE AND NATION, *supra* note 7 at xiii.

9 JAMES WILSON, CONSIDERATIONS ON THE NATURE AND EXTENT OF THE LEGISLATIVE AUTHORITY OF THE BRITISH PARLIAMENT (Aug. 17, 1774), *reprinted in* 2 THE WORKS OF JAMES WILSON *supra* note 3 at 721.

his formulation of the "We hold these truths" paragraph of the Declaration of Independence.<sup>10</sup>

As the political situation deteriorated, Wilson found himself swept into revolutionary politics. In May of 1775, he was appointed to the Pennsylvania delegation to the Second Continental Congress. This was his first experience with national politics, and it brought him into direct contact with the revolutionary leaders from other colonies, notably with Thomas Jefferson, Benjamin Franklin, and John Adams. The largest issue confronting the Congress in 1775–76 was, of course, whether to proclaim independence from Great Britain. *If* independence were to be declared, it was essential that Pennsylvania, one of the largest colonies, vote in favor. However, the Pennsylvania delegation in the spring of 1776 was divided, and it initially opposed independence. Wilson seems to have played the crucial role in persuad-

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10 THE COMMONPLACE BOOK OF THOMAS JEFFERSON: A REPERTORY OF HIS IDEAS ON GOVERNMENT 316–17 (Gilbert Chinard ed., 1926). It is likely, though not certain, that Wilson's pamphlet directly influenced the opening paragraphs of the Declaration of Independence. In his introduction, Chinard remarks that Jefferson's "Article 832 [the Wilson quotation] is in some respects the most interesting and certainly the most puzzling abstract in the *Commonplace Book*." Gilbert Chinard, *Introduction to THE COMMONPLACE BOOK OF THOMAS JEFFERSON*, *supra* at 39. This is because Jefferson quotes the paragraphs immediately *preceding* and immediately *following* these words of Wilson (which he did *not* quote):

All men are, by nature, equal and free: no one has a right to any authority over another without his consent: all lawful government is founded on the consent of those who are subject to it: such consent was given with a view to ensure and to increase the happiness of the governed, above what they could enjoy in an independent and unconnected state of nature. The consequence is, that the happiness of the society is the *first* law of every government.

WILSON, *supra* note 3, at 723.

Carl Becker, in his classic 1922 study of the Declaration, noted the similarity between this passage from Wilson and the central argument of Jefferson's Declaration, CARL L. BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS 105–13 (1922), but Becker was unaware of the extract in the *Commonplace Book*. Chinard discusses this extract in his introduction, and concludes that it is impossible to date it precisely. Chinard, *supra* at 41–44. It may have been copied shortly before Jefferson wrote the Declaration, or even afterwards. Thus it remains an open question whether Jefferson was directly influenced by Wilson (and did not bother to copy the paragraph because he had already used it); or Jefferson may have come to his formulation independently of Wilson, perhaps drawing on some third source. On the latter point, Becker oddly says of the quote from Wilson, "This reminds us of the Declaration of Independence, and sounds as if Wilson were making a summary of Locke." BECKER, *supra* at 108. Wilson in fact gives a footnote in this paragraph referring not to Locke, but to the Swiss jurist Jean-Jacques Burlamaqui. Garry Wills, echoing Chinard, points out that if Wilson was not the direct source for Jefferson's famous words, then the two men were most likely both drawing independently from Burlamaqui. WILLS, INVENTING AMERICA, *supra* note 6, at 250–51. Wills wishes to make the stronger claim that Jefferson's Declaration was *not* influenced by Locke; the point about Burlamaqui does not settle that matter because Burlamaqui himself was influenced by Locke.

ing the Pennsylvania delegation to vote in favor—a vote which in turn persuaded the other wavering states to join the majority.<sup>11</sup>

The next twelve years were rich in incident, though not in philosophical writing. Wilson shuttled between his law practice, his political service, and his extensive economic investments. This period gave him his first extended, practical experience with the issues that were to loom large in the Constitutional Convention of 1787; and although there is much to say about this tumultuous period, for our present purposes a brief summary of the principle events that have the greatest significance for his subsequent constitutional thinking will have to suffice.

### A. *Treason Trials*

In June of 1778, Wilson moved his residence to Philadelphia, which had only just been liberated from its occupation by General Howe's army. In an atmosphere of public hysteria, a handful of Quakers and alleged Tory sympathizers were accused of collaborating with the British and placed on trial for treason. Wilson agreed to serve as their defense counsel. Wilson was already an object of distrust to the more radical revolutionaries, who wrongly believed that he had delayed voting for Independence because he harbored loyalist sympathies. In these circumstances, as events were to show, his decision to uphold the rights of accused traitors in the middle of a bitter civil war required considerable personal bravery. He argued the case with great zeal, reviewing for the jury the English law of treason and insisting upon a strict standard of evidence. In the end he secured the acquittal of nineteen of his clients, although four others went to the gallows. This incident seems to have been of great impor-

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11 Dickinson in particular still hoped to avoid a final breach with Great Britain as late as July 1776. On July 1, when Independence was first formally voted upon, only nine delegations voted in favor. The Delaware delegation split; New York abstained; and South Carolina voted against, as did the delegation from Pennsylvania, by an internal vote of 4-3. It is probable that that evening Wilson persuaded two of his close associates—John Dickinson and Robert Morris—not to take their seats the following day, thus allowing Pennsylvania to vote in favor by a margin of 3-2. With this vote on July 2, the other states fell into line, and unanimity was achieved. In the final tally, only New York continued to abstain. (This vote of July 2 was of course the vote only to *declare* independence; the adoption of Jefferson's text *explaining* the earlier vote occurred on July 4.) The story of Wilson's part in these maneuverings is told in SMITH, *supra* note 4, at 78-89.

tance to Wilson, and he appears to have been responsible for inserting the Treason Clause into the U.S. Constitution.<sup>12</sup>

### B. *The Olmstead Case*

In 1778, Wilson was involved in litigating one of the most important admiralty cases of the Revolutionary era. A group of American sailors, led by Gideon Olmstead, had been captured by the British at sea, and then themselves captured the British ship on which they were being held prisoner and brought the ship to Philadelphia. The Admiralty Court of Pennsylvania awarded only one fourth of the prize money to Olmstead and his crew; most of the rest went directly or indirectly to Pennsylvania. The Continental Congress meanwhile had set up a special Court of Commissioners to hear appeals from state courts in prize cases. Wilson argued Olmstead's case before the Commissioners, who reversed the decision of the Pennsylvania court and awarded Olmstead a larger share of the prize money. The Pennsylvania court, however, flatly refused to obey the decision of the Congressional Commissioners. Wilson tried for years to persuade Congress to exert its authority in the case, but without success. The case dragged on in the courts for years, long after Wilson and many of the principals had died.<sup>13</sup> The case, involving as it did the relative powers of state and national courts, brought home to Wilson the need for a strong, national judiciary with supremacy within its sphere of jurisdiction over the courts of the states. As we shall see, he was to argue forcefully for this position at the Philadelphia Convention.

### C. *"Fort Wilson"*

Wilson's social position as a wealthy Philadelphia lawyer, his delay in voting for Independence, and his leadership of the campaign to repeal the radical Pennsylvania Constitution of 1776, all made him an

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12 Willard Hurst, *Treason in the United States*, 58 HARV. L. REV. 395, 404 (1945); see also the discussion in SMITH, *supra* note 4, at 117–23. As this article was going to press, the draft of a meticulous article examining the treason trials appeared on SSRN. Carlton F. W. Lawson, *The Revolutionary American Jury: A Case Study of the 1778–1779 Philadelphia Treason Trials* (U.C. Davis Legal Studies Research Paper No. 134, Mar. 18, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1108443](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1108443).

13 It was not finally resolved until 1809, when the Supreme Court intervened. In these later proceedings, it was, ironically, Justice Bushrod Washington, Wilson's former law student and then his successor on the Supreme Court, who ordered members of the Pennsylvania militia fined and jailed for resisting the authority of the United States. But those events lay decades in the future. The case is discussed in SMITH, *supra* note 4, at 133–36.



object of suspicion to the more radical revolutionaries; and his successful defense of accused traitors pushed the limits of prudence. The jury verdicts caused widespread anger, much of it directed against Wilson. In October of 1779, a group of disaffected and unpaid members of the militia gathered at a Philadelphia tavern to complain of their grievances and of the influence of the "Tories and profiteers." After some heavy drinking, a cry went up of "Get Wilson," and an armed mob set out in the direction of his house. Wilson and a number of his friends (including the financier Robert Morris) barricaded themselves inside Wilson's house. The mob wheeled out a canon; shots were fired; the mob broke in to the house and bayoneted one of the defenders before being driven back by musket fire; the City Troop arrived and restored order. Six people were killed in this incident, and Wilson for some weeks was forced into hiding.<sup>14</sup>

#### D. Banking

Throughout the period 1776–87 Wilson continued to read deeply in law and political theory and also in banking and finance, notably the works of the Scottish economist Sir James Stewart. At this time, American banking and finance were in an embryonic state; and even thinkers as astute as Jefferson and Madison, decades later, in their arguments against a national bank, were to display a remarkably weak understanding of the basic principles of national finance. In this field, Wilson and especially his friend Robert Morris were pioneers of American banking. In 1780, Wilson and Morris, distressed by the inability of Congress to provide funds for Washington's troops—a significant cause of their own near-lynching at "Fort Wilson"—called a meeting of prominent Philadelphians to incorporate a State Bank of Pennsylvania whose purpose would be to "supply . . . provisions for the armies of the United States."<sup>15</sup> The Bank, with Wilson and Morris among its principal subscribers, opened in July and was an immediate financial success. Politically, however, Wilson was unable to persuade the Pennsylvania Assembly to use the Bank as an instrument of state financial reform, and it was allowed to go out of business after little more than a year. Wilson remained persuaded of the importance of

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<sup>14</sup> This well-known incident has been described in several places: see, for example, SMITH, *supra* note 4, at 129–39, John K. Alexander, *The Fort Wilson Incident of 1779: A Case Study of the Revolutionary Crowd*, 31 WM. & MARY Q. 589 (1974), and the insightful chapter by JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 15–46 (2007).

<sup>15</sup> SMITH, *supra* note 4, at 142. For the full story, see *id.* at 140–58.

placing American finances on a solid foundation, and he began working with Morris (who had been named Superintendent of Continental Finances in early 1781) to establish a permanent national bank under the authority of Congress. Morris proposed the plan to Congress, which chartered the Bank of North America at the end of December. For the next several years, the Bank of North America (which was chartered both by Congress and by Pennsylvania) was the object of intense political controversy, particularly in Pennsylvania. The radicals portrayed the bank as a tool of rich, eastern aristocrats and blamed it for the financial hardship being suffered in the western portions of the state.

In 1785, the Assembly took steps to repeal the Bank's state charter. This led the bank to appeal to Congress. Wilson, as the bank's attorney, presented the elaborate case in defense of the constitutionality of the bank. He had two central issues to address. First, did Congress have the constitutional power under the Articles of Confederation to grant a corporate charter to the bank? Here Wilson took a strongly nationalist line. No single state, he argued, has the power to incorporate a national bank; therefore this power, if it is to be exercised at all, must be exercised by Congress. Moreover, the fifth Article of the Confederation declares that "for the more convenient management of the *general interests* of the United States, delegates shall be annually appointed to meet in congress."<sup>16</sup> Wilson argued from this provision that the United States had "general rights, general powers, and general obligations, not derived from any particular states, nor from all the particular states, taken separately; but resulting from the union of the whole . . ."<sup>17</sup> Second, having granted a state corporate charter to the Bank, could Pennsylvania now revoke its own earlier grant? Here Wilson argued that the charter was to be viewed as a *contract* between Pennsylvania and the shareholders of the bank and was to be governed by ordinary principles of contract law, which are binding on the state, and therefore prevented the state's unilateral termination of its contractual obligations. In these arguments Wilson was ultimately successful, and in the spring of 1787 the Assembly finally restored the charter.

More importantly, however, was that in the course of five years spent defending the bank, Wilson analyzed in detail the issues of corporate charters, national powers, and contractual obligations that were to loom large decades later in the work of the Marshall Court.

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16 ARTICLES OF CONFEDERATION art. V (1871), *quoted in* SMITH, *supra* note 4, at 152.

17 SMITH, *supra* note 4, at 152.

The Contracts Clause in the Constitution was an outgrowth of the arguments about Pennsylvania's authority to breach its own charter, and Hamilton's famous "Plan for a National Bank" and strenuous defense of implied federal powers in large part follows the analysis Wilson gave ten years earlier.<sup>18</sup>

### *E. The Wyoming Valley Litigation*

For years, because of conflicting interpretations of colonial charters and Indian treaties, a boundary dispute had raged between Pennsylvania and Connecticut over the ownership of the Wyoming Valley. In 1782 the matter was litigated under Article IX of the Articles of Confederation. Wilson served as the attorney for Pennsylvania. In the absence of any national court, Article IX provided a cumbersome procedure for resolving disputes between states.<sup>19</sup> Wilson won the case for Pennsylvania, but he drew from this litigation two important lessons: First, that a dispute between states could be resolved, not through force of arms, but by appeal to what in later writings he was to conceive of as an international judicial tribunal. Second, that the United States needed a permanent federal judiciary with authority *over* the states, rather than the unwieldy procedure of Article IX. He was to argue the latter point forcefully and repeatedly at the Constitutional Convention in 1787.

### *F. National Finances*

After a four-year absence, Wilson was reappointed as a delegate to the Confederation Congress in 1782, taking his seat in January 1783. There he made the acquaintance of two younger delegates: Alexander Hamilton and James Madison. Madison had been in Congress for nearly two years and, despite his youth at thirty-one years old, had already established himself as one of the dominant figures in the national legislature. The immediate problem facing Congress was the chaotic state of the nation's finances. Washington's army had not been paid and was growing mutinous; the peace treaty with Britain

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18 Hamilton paid close attention to the bank arguments at the time. Indeed, a copy of Wilson's plan for the Bank of North America, in Wilson's handwriting, is in the Hamilton papers in the Library of Congress; a copy of Hamilton's "Plan for a National Bank," in Hamilton's hand, is in the Wilson papers in the Historical Society of Pennsylvania. SMITH, *supra* note 4, at 158.

19 In this procedure, Congress would name thirty-nine potential arbitrators, three from each state; the parties would alternately strike out twenty-six of the names; from the surviving thirteen, nine would then be chosen by lot to hear the case.

had not yet been signed; and French loans and the funds provided by the Bank of North America were inadequate to preserve solvency. It was necessary for Congress to raise money, but under the Articles of Confederation taxes had to be raised and approved by all the states. In the debates of January, 1783, Wilson, Hamilton, and Madison all urged Congress to look beyond the immediate crisis over military pay and to establish a permanent revenue for the national government, adequate to satisfy the existing obligations and to fund future expenses. Wilson argued strenuously for the establishment of general funds, to be collected directly by national tax collectors. He was strongly supported in his arguments by Hamilton.<sup>20</sup> But his proposal for a scheme of comprehensive national taxation was too radical, and Congress rejected it.<sup>21</sup>

Wilson was evidently frustrated by the inability of Congress to accomplish any of its tasks, and in the fall of 1783 he withdrew from the Pennsylvania delegation. He spent 1784 primarily on his legal and business affairs but was reappointed to Congress in April of 1785. He proposed recommending to the states that they grant Congress the power to regulate the commerce of the United States, but his proposal was stillborn. Congress was at this time almost at the point of dissolution, frequently unable to achieve a quorum and entirely unable to pass significant legislation. Wilson himself was absent for most of 1785. He put in a few brief appearances in the spring of 1786, and then departed for good, apparently having concluded that there was no point in attending.<sup>22</sup>

Many others had reached a similar conclusion, and decided that the United States could no longer continue under the Articles of Confederation. When the Annapolis Convention met in 1786 to consider remedies, three of Wilson's close associates—Madison, Hamil-

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20 SMITH, *supra* note 4, at 177–81. Wilson's proposal called for a tax on salt (which would fall most heavily on New England); a tax on land (which would fall most heavily on the southern and middle states); an impost on trade; and an excise tax on alcohol and coffee. *Id.* at 182.

21 In April, 1783, Madison persuaded Congress to accept a compromise plan, which raised taxes for a limited period of twenty-five years, and exclusively for expenses incurred in fighting the War of Independence. In addition, national expenses were to be apportioned in accordance not with land, but with population (with slaves counted in the ratio of three-fifths to the free population). This was the ultimate origin of the Three-Fifths Clause in the U.S. Constitution. U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2. See 6 THE PAPERS OF JAMES MADISON 407–08 (William T. Hutchinson & William M.E. Rachal eds., 1969); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 31, 37–38, 69, 379 n.37 (1996).

22 SMITH, *supra* note 4, at 194–201.

ton, and his old mentor, John Dickinson—were present, and it was no surprise that the final resolution called upon the states to send delegates to a convention the following year in Philadelphia “to devise such further provisions as shall appear to them necessary to render the constitution of the Foederal [sic] Government adequate to the exigencies of the Union . . . .”<sup>23</sup> Nor was it a surprise that Wilson was chosen as one of Pennsylvania’s delegates to the 1787 Convention (even though the selection occurred only on the third ballot). By this time, Wilson had a reputation as one of the most profound legal scholars in America. One of the delegates to the Philadelphia Convention, William Pierce, in his character sketch of the other delegates, described Wilson as follows:

Mr. Wilson ranks among the foremost in legal and political knowledge. . . . Government seems to have been his peculiar Study, all the political institutions of the World he knows in detail, and can trace the causes and effects of every revolution from the earliest stages of the Grecian commonwealth down to the present time. No man is more clear, copious, and comprehensive than Mr. Wilson, yet he is no great Orator. He draws the attention not by the charm of his eloquence, but by the force of his reasoning. He is about 45 years old.<sup>24</sup>

An outside observer, looking at Wilson on the eve of his appointment and asked to predict what role he might play in the Convention, would have seen a prosperous Philadelphia lawyer with extensive business interests—a member of the ruling elite who was closely associated with the Eastern establishment in state politics and himself a near casualty of mob violence. If (as some have argued) the Constitutional Convention was a counter-revolutionary enterprise, an attempt by the propertied classes to secure their self-interest and to withdraw from the pledge of equality in the Declaration of Independence, then Wilson would have seemed predestined to be one of the ringleaders of the counter-revolution, favoring the East over the West, seeking to limit the franchise, to protect private property, and to cabin the power of the people. What Wilson in fact did in the Convention, and whether it corresponds to this prediction, is a matter we shall have to consider later.

23 1 THE FOUNDERS’ CONSTITUTION 185–87 (Philip B. Kurland & Ralph Lerner eds., 1987). An illuminating discussion of the crisis of the Confederation, of the Annapolis Convention, and in particular of the evolution of Madison’s constitutional thought in the year immediately prior to the Philadelphia Convention, is provided by RAKOVE, *ORIGINAL MEANINGS*, *supra* note 21, at 23–56.

24 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 91–92 (Max Farrand ed., rev. ed. 1966) [hereinafter CONVENTION RECORDS].

After the Convention was over, Wilson immediately threw himself into the ratification debates in Pennsylvania. He was the only Framers appointed to the Pennsylvania ratifying convention and was the central figure in the decision of Pennsylvania to ratify the Constitution. Pennsylvania's Convention was one of the first to meet, and Pennsylvania was the first large state to ratify, so the debates were watched closely throughout the nation. Indeed, Wilson's "State House Yard speech" of October 6, 1787 in defense of the Constitution was widely distributed throughout the United States, and at the time it attracted more discussion and comment than the entire sequence of essays in *The Federalist*.<sup>25</sup>

In September, 1789, President Washington appointed Wilson to be an associate justice of the Supreme Court, an appointment that did not prevent him from being the principal architect of the widely admired Pennsylvania Constitution of 1790.<sup>26</sup> Justice Wilson was not yet fifty, and his future prospects must have seemed bright. At least on paper he was now one of the wealthiest men in America, owning well over a million acres of land throughout the United States. At this time, in addition to his other responsibilities, he agreed to teach an ambitious program of lectures on law at the College of Philadelphia. His course was to begin with the broadest philosophical foundations of the legal order, and then to treat natural law, the law of nations, and the common law. The lectures on these topics he in fact largely delivered in the winter of 1790–91. The following winter, 1791–92, he narrowed his focus to American law, discussing the constitutions of the United States and Pennsylvania, the American judicial system, and the law of crime and punishment.<sup>27</sup>

In 1792, the College of Philadelphia became the University of Pennsylvania, and Wilson was appointed the first professor in the Law

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25 See BERNARD BAILYN, *FACES OF REVOLUTION: PERSONALITIES AND THEMES IN THE STRUGGLE FOR AMERICAN INDEPENDENCE* 230 (1990) (noting that Wilson's speech was "the most famous, to some the most notorious, federalist statement of the time" and that "there were floods of refutations, confirmations, and miscellaneous responses" in response). Jack Rakove notes that Wilson's speech was "the first notable effort by any framer to move beyond broad generalities and consider the Constitution on substantive grounds." RAKOVE, *ORIGINAL MEANINGS*, *supra* note 21, at 143.

26 Wilson coveted the position of Chief Justice, and even wrote to Washington to put his name forward for the position. SMITH, *supra* note 4, at 304–05. Washington instead appointed John Jay of New York. Jay was a far less accomplished lawyer than Wilson; but whereas Pennsylvania had enthusiastically and quickly ratified the Constitution, New York had done so only narrowly and late, and Washington likely wished to secure its allegiance with a prominent appointment.

27 *Id.* at 297–309, 324–40.

Department.<sup>28</sup> He had originally planned to lecture in 1792–93 on what he called the “retail business” of the law, and his lectures would have treated such topics as the law of property, the law of obligations, and the rules of pleading and procedure. But other duties now absorbed his time, and he delivered no further lectures. He continued his labors on the Supreme Court, riding circuit and hoping in vain that Washington would promote him to Chief Justice. He worked intensively on an arduous and time-consuming project to arrange and digest the laws of Pennsylvania and of the United States.<sup>29</sup>

He also devoted ever more time to the management of his complex and increasingly precarious financial affairs. He had invested heavily in the purchase of wild land in Pennsylvania, in the South, and especially in the West. His holdings had been purchased mostly on credit. If European investment and immigration had held up, he would have become spectacularly wealthy. But the wars of the French Revolution, the tightening of European credit, and a decline in immigration led to the panic of 1796–97. Wilson’s financial empire came crashing down. In 1797, he rode circuit for the Supreme Court in the South, fearful all the while that his creditors would catch up with him. He returned to Philadelphia, was briefly imprisoned for debt in New Jersey, and fled south again, hoping to sort out his affairs in North Carolina and Georgia. In North Carolina, staying near the home of his friend, Justice James Iredell, he was tracked down by Pierce Butler, to whom he owed \$197,000; Butler had him jailed, this time for several weeks.<sup>30</sup> He thus became the only sitting Justice of

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28 Wilson, in fact, never delivered any further lectures after this appointment. *Id.* at 346. Perhaps for this reason, his son, Bird Wilson, who published the *Lectures* posthumously in 1804, chose to identify Wilson on the title page as “One of the Associate Justices of the Supreme Court of the United States, and Professor of Law in the College of Philadelphia.” 1 THE WORKS OF JAMES WILSON, *supra* note 3, at 53 (emphasis added). Bird Wilson himself, at the age of fifteen, was one of the first graduates of the new University of Pennsylvania, taking his bachelor’s degree in April 1792; the diploma was signed, *inter alios*, by his father as Professor of Law. SMITH, *supra* note 4, at 352.

29 Bird Wilson discusses these projects in the Preface to the 1804 edition of his father’s *Works*. 1 WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. iii–xiii, *reprinted in* 1 THE WORKS OF JAMES WILSON, *supra* note 3, at 59.

30 See generally M. C. Klingelsmith, *James Wilson and the So-Called Yazoo Frauds*, 56 U. PA. L. REV. & AM. L. REG. 1 (1908) (describing late eighteenth-century investment companies, or “Yazoo” land companies, formed to develop Western lands, and Wilson’s ill-fated involvement with them). The Wilson biography by SMITH, *supra* note 4, gives further details on Wilson’s financial speculations, though the treatment is neither exhaustive nor particularly probing. See, e.g., *id.* at 350–51 (discussing a financial panic in March, 1792, which “strained to the utmost” Wilson’s finances); *id.* at 361 (explaining that Wilson had to procure a loan to avoid financial “disaster”). There is here a large and important topic for future investigation: one would like to know precisely how Wilson conducted his

the Supreme Court to spend time in prison. These experiences destroyed his reputation and his health; he would likely have been impeached, except that, after his release from prison, he contracted a fever, probably malaria, and died in abject poverty in North Carolina on August 21, 1798.<sup>31</sup>

## II. SCHOLARLY REPUTATION

Even this cursory and superficial sketch of the external facts of Wilson's life makes it clear that he was a figure of considerable importance—a signer of both the Constitution and the Declaration of Independence, a member of the Continental and Confederation Congress, a prominent attorney, a legal scholar, and a justice of the first Supreme Court. These facts raise the question of why he has been less intensively studied than one might expect. At one level, the subsequent neglect of Wilson is not difficult to explain. The circumstances of his downfall sent his reputation into a sudden eclipse. In 1804 his son published the notes for his *Lectures on Law*,<sup>32</sup> but by this time Wilson was already largely forgotten, and the book appears to have had no impact. As for his other accomplishments, the extent of his contributions to the framing of the U.S. Constitution long remained a secret. Indeed, nothing *could* have been publicly known about the internal workings of the Philadelphia Convention until Madison's *Notes* were published in 1840, more than fifty years afterwards. By that time the attention of the nation was focused on the looming conflict between North and South. There is virtually no discussion of Wilson in books written in the nineteenth century. Only at the very end of the century, when scholars began to occupy themselves in earnest with the records of the Constitutional Convention, did Wilson's reputation start to recover. A perceptive article by An-

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business affairs, how he got into trouble, how he tried to rectify the situation, and how typical or atypical his conduct was for the business world of the late eighteenth-century. There are indications this was a relatively common phenomenon. See, e.g., *id.* at 382 (describing the peril many of Wilson's friends and contemporaries found themselves in due to failed land speculation ventures; in the winter of 1796–97 in Philadelphia, “sixty-four people had gone to jail, among them some of the city's most distinguished citizens”).

31 For an account of Wilson's relations to Iredell and of his last days, see generally Hampton L. Carson, *James Wilson and James Iredell. A Parallel and a Contrast*, 45 PA. MAG. HIST. & BIOGRAPHY 1 (1921). See also SMITH, *supra* note 4, at 387–88 (providing an account of Wilson's late-life convalescence and death).

32 See 1 WORKS OF THE HONOURABLE JAMES WILSON, L.L.D., *reprinted in* 1 THE WORKS OF JAMES WILSON, *supra* note 3, at 53; 2 WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. (Bird Wilson ed., 1804), *reprinted in* 2 THE WORKS OF JAMES WILSON, *supra* note 3, at 441.



drew McLaughlin appeared in 1897.<sup>33</sup> In 1913, Max Farrand, in his classic study of the framing of the Constitution, wrote the following remarkable conclusion in which he summed up the contributions of the individual delegates. The passage needs to be quoted at length:

In the achievement of [the Convention's] task James Madison had been unquestionably the leading spirit. It might be said that he was the masterbuilder of the Constitution. . . . [W]hen one studies the contemporary conditions, and tries to discover how well the men of that time grasped the situation; and when one goes farther and, in the light of our subsequent knowledge, seeks to learn how wise were the remedies they proposed,—Madison stands pre-eminent. He seems to have lacked imagination, but this very lack made his work of peculiar value at the moment. His remedies for the unsatisfactory state of affairs under the confederation, were not founded on theoretical speculations, they were practical. They were in accord with the historical development of our country and in keeping with the genius of our institutions. . . .

. . . .

Second to Madison and almost on a par with him was James Wilson. In some respects he was Madison's intellectual superior, but in the immediate work before them he was not as adaptable and not as practical. Still he was Madison's ablest supporter. He appreciated the importance of laying the foundations of the new government broad and deep, and he believed that this could only be done by basing it upon the people themselves. This was the principal thing for which he contended in the convention, and with a great measure of success. His work on the committee of detail was less conspicuous but was also of the greatest service.<sup>34</sup>

These striking and highly compressed remarks appear in Farrand's concluding chapter, and one can only assume that such a meticulous scholar must have weighed his final summing-up with the greatest care. Nonetheless, his words are anything but straightforward, and they need to be carefully unpacked. Farrand here can be understood

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33 See Andrew C. McLaughlin, *James Wilson in the Philadelphia Convention*, 12 POL. SCI. Q. 1 (1897). McLaughlin remarked in words that are still largely accurate today:

The work of James Wilson as a framer of the constitution seems not to have received its just recognition. The more careful historians who have worked over the period testify to his ability and influence; but their praise is general, not particular. . . . While it is true, indeed, that historians have given him passing commendation, his name has generally been linked with the names of other men far less deserving; and this argues lack of full appreciation. We are asked, for example, to admire the work of Gerry and Sherman and Franklin and Robert Morris and Dickinson and Randolph and Mason. Yet some of these men contributed little to the results of the convention; while others of them were at times obstacles in the way to a reasonable conclusion or advocates of the sheerest folly. If Wilson's work be closely examined, its greatness and worth will appear, and will place him above all but one or two men of the convention. Perhaps Madison alone can be called his equal in judgment and far-sighted wisdom.

*Id.* at 1.

34 FARRAND, *supra* note 1, at 196–98.

to be making two interlocking claims. The first is a judgment about the merits of Madison and Wilson as compared to the *other* delegates: namely, that, within the four walls of the Convention itself, Madison and Wilson were the predominant intellects. On this claim, the subsequent historiography of the Convention has tended to agree with Farrand.<sup>35</sup> Only Alexander Hamilton was their intellectual peer; but his ideas were too aristocratic, too contrary to the prevailing mood of the Convention, to carry much influence with the other delegates. As a result, Hamilton had virtually no impact on the proceedings. Indeed, finding himself on the sidelines, he left Philadelphia in frustration on June 29 before the Convention was half over; he returned at the very end, but only to participate in the signing ceremonies for a document of which he scarcely approved.<sup>36</sup> As for the other delegates, figures such as Elbridge Gerry, Rufus King, George Mason, Gouverneur Morris, Edmund Randolph, and Roger Sherman, each made important contributions, and each helped to shape the final document in a significant way. But their contributions were primarily tactical, contributions of detail, and none of these delegates can be credited with a comprehensive and carefully worked-out *theory* of constitutional governance of the sort possessed by Madison and Wilson.

Farrand's second claim is more intricate and concerns the relative merits of Madison and Wilson in comparison with each other. His assessment in particular of Madison is remarkable and contains both a positive and a negative side. On the negative side, he says that Madison "seems to have lacked imagination," and also says that "[i]n some respects" Wilson was his "intellectual superior."<sup>37</sup> But then, on the positive side, he says that Madison was nevertheless the chief architect

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35 This is a natural conclusion to draw, even on a relatively casual reading of the proceedings of the Convention. Of all the delegates, Gouverneur Morris spoke the most frequently (173 times), followed by Wilson (168) and Madison (161). ROSSITER, *supra* note 1, at 252. These three dominated the discussions; but Morris's contributions were more uneven in quality than those of Madison and Wilson. See *id.* at 248–49.

36 The gap between Hamilton's talents, which were immense, and his actual accomplishments at Philadelphia, which were virtually nil, is greater than for any other delegate; it is for this reason that one historian has concluded that he was "[f]ar and away the most disappointing man" at the Convention. *Id.* at 252. It is, of course, true that Hamilton ultimately signed the document and that he brilliantly urged its ratification in the *Federalist*, but he only did so because the alternatives appeared to him to be worse. Madison noted Hamilton's famous remark on the matter at the conclusion of the Convention: "No man's ideas were more remote from the plan than [Hamilton's] own were known to be; but is it possible to deliberate between anarchy and Convulsion on one side, and the chance of good to be expected from the plan on the other[?]" 2 CONVENTION RECORDS, *supra* note 24, at 645–46.

37 FARRAND, *supra* note 1, at 196–97.

of the Constitution, whereas Wilson was merely "Madison's ablest supporter."<sup>38</sup> In the positive part of this assessment, Farrand's view is today entirely orthodox. This was not always the case. Particularly in the aftermath of the Civil War, there was a tendency among Northern historians to disparage the Virginian advocates of states' rights, and to elevate Hamilton at Madison's or Jefferson's expense.<sup>39</sup> But since Farrand's time, historians have routinely applied to Madison such labels as the "leading spirit of the Convention," or "the father of the Constitution,"<sup>40</sup> or asserted (it is not quite the same thing) that "Madison's stature as the leading American constitutionalist of the eighteenth century is beyond dispute."<sup>41</sup>

Farrand's negative claim is more striking, and it cries out for further discussion. Precisely how did Madison—of all people—exhibit a lack of imagination, and in what ways, exactly, was James Wilson his intellectual superior? Farrand himself does not tell us, and subsequent historians have not sought to develop his hints.

The core of his argument appears to be that, in distinction to Wilson, Madison's contributions "were not founded on theoretical speculations, they were practical."<sup>42</sup> But here the word "practical" is ambiguous, and whichever way we interpret it, Farrand's claim is problematic. Perhaps by "practical" Farrand simply means "argumentatively effective"—that is, that Madison's arguments were better calculated than Wilson's to win over a majority of the delegates to the Constitutional Convention. If that is the claim, it is open to the ob-

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38 *Id.* at 198.

39 Henry Cabot Lodge, in particular, against the weight of the evidence, sought to reassign credit for authorship of several of the *Federalist* papers away from Madison to Hamilton. See Douglass Adair, *The Authorship of the Disputed Federalist Papers*, 1 WM. & MARY Q. 97, 112–16 (1944).

40 For a representative sampling of twentieth-century encomia from leading scholars, see IRVING BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION, 1787–1800 (1950); RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 229 (1971) ("[Madison] earned the title later bestowed upon him, Father of the Constitution."); ROSSITER, *supra* note 1, at 247 ("Although . . . none of the men of 1787 would have dreamed of calling him (or anyone else) the 'Father of the Constitution,' he was, beyond a doubt, the leading spirit . . ."); CHARLES WARREN, THE MAKING OF THE CONSTITUTION 57 (1928) ("[H]e has been termed, without dissent, the 'Father of the Constitution.'"). Most of these writers tacitly or explicitly follow Farrand's analysis.

41 Jack N. Rakove, *James Madison in Intellectual Context*, 59 WM. & MARY Q. 865, 865 (2002). Rakove's claim appears to be primarily about the quality of Madison's constitutional thought; the scholars in the previous footnote, in contrast, are primarily concerned with his influence on the Convention. Since three leading constitutional thinkers—Jefferson, Adams, and Hamilton—were absent from all or most of the Convention, Rakove's claim is stronger.

42 FARRAND, *supra* note 1, at 196.

jection that—as many scholars have pointed out—Madison’s arguments were in fact far from overwhelmingly successful.<sup>43</sup> He (and Wilson) lost the crucial vote on July 16 for proportional representation in the Senate; and in fact, this vote—as Madison well recognized—was at bottom a decisive rejection of the very core of his “Virginia Plan.”<sup>44</sup> Again, it is true that Wilson’s speeches occasionally

<sup>43</sup> Forrest McDonald calls Madison’s reputation as “the Father of the Constitution” a “myth,” and attributes it first, to his having kept the records of the Convention, and second, to the vagueness of the ideas he brought with him to Philadelphia. FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 205 (1985). The Madisonian Constitution, he argues, “bears limited resemblance to the document that was drafted by the convention.” *Id.* at 205–06. McDonald furthermore observes that, “Overall, of seventy-one specific proposals that Madison moved, seconded, or spoke unequivocally in regard to, he was on the losing side forty times.” *Id.* at 208–09. For a careful analysis of the voting patterns and of the relative successes, over the course of the Convention, of Madison and his opponents, see David Brian Robertson, *Madison’s Opponents and Constitutional Design*, 99 AM. POL. SCI. REV. 225 (2005).

<sup>44</sup> Madison left the Convention with a sense of defeat, and he expressed his doubts about the future of the Constitution in two letters to Jefferson. The first (dated September 6, 1787 and written partly in code) sketched the main points of the Constitution, and continued:

These are the outlines. The extent of them may perhaps surprize [sic] you. I hazard an opinion nevertheless that the plan should it be adopted will neither effectually answer its national object nor prevent the local mischiefs which every where excite disgusts ag[ain]st the state governments. The grounds of this opinion will be the subject of a future letter.

10 THE PAPERS OF JAMES MADISON 163–64 (Robert A. Rutland et al. eds., 1977) (editorial notations omitted). Madison then on October 24 sent Jefferson a further letter—17 pages in manuscript—giving a detailed explanation for his opinion. As the editors of the Madison papers remark in their headnote, the letter “reveals that the man who later became an indefatigable publicist in support of the new Constitution was in fact profoundly disappointed with the results of the convention.” *Id.* at 205. For further discussion of Madison’s post-convention views, see, for example, RICHARD K. MATTHEWS, *IF MEN WERE ANGELS: JAMES MADISON AND THE HEARTLESS EMPIRE OF REASON* 15 (1995) and Charles F. Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government*, 36 WM. & MARY Q. 215, 230–33 (1979). Madison himself in later years repeatedly stressed that the drafting of the Constitution was a collaborative enterprise, the product of an assembly of men, whose opinions changed, often radically, during the course of the proceedings. See, e.g., James Madison, *Genl. Remarks on the Convention* (c. 1821), reprinted in 3 CONVENTION RECORDS, *supra* note 24, at 455; James Madison, *Preface to the Debates in the Convention of 1787*, reprinted in CONVENTION RECORDS, *supra* note 24, at 539–51. But beyond that, Madison also insisted that the meaning of the Constitution was not to be found in the intentions of the Framers, but rather in the state ratification Conventions. As he said in a speech to the House of Representatives in 1796:

But, after all, whatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the oracular guide in expounding the Constitution. As the instrument came from them it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions. If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it, not in the

strayed into abstract theoretical domains, to the evident puzzlement of his listeners, or that sometimes he would make proposals that the rest of the Convention regarded as too extravagant to be taken seriously. But the same thing is no less true of Madison. His long speech on June 6 about the theoretical virtues of an extended republic—the speech in which he outlined the core of the famous theory he was later to present to the world in *The Federalist No. 10*<sup>45</sup>—seems to have been greeted by the other delegates not so much with admiration as with stark incomprehension.<sup>46</sup> At any rate, it is not evident either that Madison was especially effective in getting his ideas accepted by the Convention, or even that he was more effective than Wilson.

Alternatively, by “practical” Farrand may mean something like “*institutionally practicable*.” That is, the claim may be that Madison put forward a scheme of constitutional governance that could work in the real world, whereas Wilson was swimming in what Farrand calls “theoretical speculations.” But this claim, no less than the other, is prob-

General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution.

*Id.* at 374. These various declarations, taken in conjunction with his recognition of the failure of his own Virginia Plan to gain acceptance at the Convention, suggest not only that Madison would have been surprised to find himself bedecked with the title, “Father of the Constitution,” but that he would have rejected it, both as a misleading overstatement of his own role, and, more importantly, as a fundamental misunderstanding of the nature of the Constitution.

45 In a recent article, Larry Kramer argues that, although it is widely assumed that the ideas of *The Federalist No. 10* played a decisive role in the drafting of the Constitution, and that the essay is therefore pivotal in interpreting the intent of the Framers, in fact those particular Madisonian ideas played essentially no role at the Convention. See Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611 (1999).

46 Indeed, one of Madison's colleagues in the Virginia legislature in 1785 observed that “after the first three weeks [he] lost all weight in the House, and the general observation was that those who had a favorite scheme ought to get Madison to oppose it, by which means it would certainly be carried.” LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC* 98 (1995). A similar dynamic appears to have been at work in Philadelphia. Madison and Wilson had a tendency to dominate the discussions; they spoke often, and at length, and at times attempted to overpower their opponents with erudition. Only Gouverneur Morris spoke more frequently. See *supra* note 35. Wilson in particular could also be sharp-tongued in his exchanges with the delegates from the smaller states. On one memorable occasion—June 11—the ill-temper of his remarks drew a tacit rebuke from Benjamin Franklin. (Since the elderly and ailing Franklin relied on Wilson to read out his speeches to the Convention Wilson was forced to deliver his own rebuke.) 1 CONVENTION RECORDS, *supra* note 24, at 197. As one reads the *Notes* of the proceedings, it is easy to imagine that these habits must have provoked irritation and resentment after several months. In fact, as the summer wore on, Madison's and Wilson's defeats became ever more frequent. For an analysis of the sequence of votes, see generally Robertson, *supra* note 43.

lematic. The problem is not just that the contrast is overdrawn.<sup>47</sup> The real problem lies elsewhere. In fact, the two senses of “practicality” pull in opposite directions. Precisely those ideas of Wilson that struck the Convention as too outlandish to be contemplated—the ideas that were most flagrantly “impractical” in the first sense—are often strikingly prescient and show that on many points he had a better practical grasp than did his fellow delegates of the way the nation was in fact to evolve. Let us take a characteristic example. At the very beginning of the Convention, on June 1, the delegates for the first time addressed the topic of the national executive. Wilson moved that the executive consist of a single person. Madison’s *Notes* record that “[a] considerable pause” followed his suggestion. In the view of many of the delegates, a single executive was, as Edmund Randolph put it, “the foetus of monarchy,” and Americans had, he added, “no motive to be governed by the British Governmt. as our prototype.”<sup>48</sup> Madison, too, at this early point in the proceedings, appears to have favored, not a single President, but either a plural presidency, or a President with a privy council; the Virginia Plan was silent on these matters.<sup>49</sup> In time, of course, the Convention, including Madison, eventually came around to Wilson’s point of view, but it was a long process and took months of patient argument. The discussion (still on June 1) then turned to the mode of selection of the executive (whether single or plural). Some delegates favored a selection by the state legislatures; Madison’s own Virginia Plan provided for a selection by the national legislature.<sup>50</sup> “Mr. Wilson,” Madison’s *Notes* tell us, “said he was almost unwilling to declare the mode which he wished to take place, being apprehensive that it might appear chimerical. He would say however at least that in theory he was for an election by the people . . . .”<sup>51</sup> Wilson’s suggestion did indeed strike

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47 Which it is. On the one hand, Madison was a profound scholar, deeply immersed in the classics of Western political theory, who prepared himself for the Constitutional Convention by undertaking a prolonged and arduous course of reading in multiple languages. Wilson, conversely, was by profession a highly successful working attorney, one of the most prominent litigators in the United States, and deeply embedded in the world of practical affairs. The fruits of Madison’s reading are evident not only in his comments during the Convention and in the pages of *The Federalist*, but throughout the letters and manuscripts reprinted in volume 9 of *THE PAPERS OF JAMES MADISON* (Robert A. Rutland et al. eds., 1975), which covers the period of April, 1786 to May, 1787, that is, the year preceding the start of the Convention. In particular, see James Madison, *Notes on Ancient and Modern Confederacies*, reprinted in *id.* at 3–24, and the accompanying headnote.

48 1 CONVENTION RECORDS, *supra* note 24, at 65–66 (June 1).

49 See *id.* at 21 (May 29).

50 See *id.*

51 *Id.* at 68 (June 1); see *infra* text accompanying note 115.

the other delegates as chimerical, and it stood no prospect of being adopted by a Convention united in its deep distrust of unbridled popular democracy.<sup>52</sup> Wilson almost alone among the delegates advocated not only the popular election of the President, but the direct popular election of the Senate, and indeed a consistent application of the principle of "one man, one vote." On each of these points his proposals were still-born, but on each subsequent experience have tended to vindicate Wilson's practical insight, not that of his colleagues.<sup>53</sup>

There is a great deal at stake in how we resolve these various ambiguities. The issues are not just of biographical importance, but of importance for understanding how the Constitution came to be formed, about who (if anybody) was its "master builder," about how it was understood by two of the subtlest and most powerful intellects at the Convention, and ultimately about what sort of authority is to be accorded to the constitutional views of Madison and of Wilson. If one studies the Convention of 1787 hoping to discover who, as a causal matter, was primarily responsible for persuading the Convention to adopt each clause of the final document, then it is important

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52 The theme of the Constitutional Convention's anti-democratic character is of course central to Charles Beard's famous interpretation. CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (Transaction Publishers 1998) (1913). The excesses of Beard's interpretation, and in particular his suggestion that the Framers were motivated primarily by their private economic self-interest, have long since been discarded by historians. See, e.g., FORREST MCDONALD, *WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION* (1958). But the broader point—that the Convention was not an exercise in broad-based egalitarian politics, but rather a clash of sectional and economic interests—remains influential, even among historians who focus their attention on the intellectual history of early American constitutionalism. Gordon Wood, for instance, writes that although "Beard's interpretation of the origins of the Constitution in a narrow sense is undeniably dead, the general interpretation of the Progressive generation of historians—that the Constitution was in some sense an aristocratic document designed to curb the democratic excesses of the Revolution—still seems to me to be the most helpful framework for understanding the politics and ideology surrounding the Constitution." GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787*, at 626 (1998).

53 I note in passing that it might be argued that Wilson's ideas were impractical in yet a third sense: namely, that even if they had been adopted by the Convention, they would have been rejected during the process of ratification; that is, that they were simply too far in advance of the political ideas of the eighteenth century. But this begs the question, for if ratification had been, not by a restricted franchise, but by universal manhood suffrage of the people at large (which is the method Wilson would certainly have favored), it is far from clear that Wilson's ideas would have been rejected. It should be noticed that in 1913, when Farrand wrote his assessment, the Seventeenth and Nineteenth Amendments had not yet been adopted, and the one-person-one-vote jurisprudence of the Supreme Court still lay decades in the future.

to establish whether Madison and Wilson were “practical” in the first sense. Conversely, if one looks to the founders primarily for their guiding *ideas*—if one turns to them for insight into the meaning and possibilities of American constitutional governance—then it is far from evident that Wilson’s theoretical tendencies—his “impracticalities” in the second sense—are a deficiency, or that Madison’s “practicality” is a strength. One would like to know, in detail, what ideas Madison and Wilson brought with them into the Convention in May of 1787, what arguments they respectively made, what strategies they attempted to follow, and how their attitudes towards the Constitution evolved over time. Only with a firm grasp on these basic facts can one hope to evaluate Farrand’s remarkably nuanced assessment of the contrasting merits of Madison and Wilson.

Farrand made his observations in 1913. The intervening century has seen a modest increase in Wilson scholarship—a dated biography, a handful of monographs of very uneven quality, several chapters in books, and fifteen or twenty scholarly articles.<sup>54</sup> But this litera-

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54 Almost the entire scholarly literature on Wilson can be grouped into the following four categories:

(1) *Biographies*. The standard biography of Wilson is CHARLES PAGE SMITH, *JAMES WILSON: FOUNDING FATHER, 1742–1798* (1956). It is dated, and not probing on Wilson’s legal or constitutional ideas, but otherwise reliable. Short and superficial, but containing supplementary information is GEOFFREY SEED, *JAMES WILSON* (1978). ANDREW BENNETT, *JAMES WILSON OF ST. ANDREWS: AN AMERICAN STATESMAN, 1742–1798* (1928) contains little of value.

(2) *Monographs*. There have been four monographic studies of Wilson. The first two were published in the 1930s and view him through the lens of Catholic natural law doctrine. See MAY G. O’DONNELL, *JAMES WILSON AND THE NATURAL LAW BASIS OF POSITIVE LAW* (1937); WILLIAM F. OBERING, *THE PHILOSOPHY OF LAW OF JAMES WILSON: A STUDY IN COMPARATIVE JURISPRUDENCE* (1938). The two more recent studies are JEAN-MARC PASCAL, *THE POLITICAL IDEAS OF JAMES WILSON, 1742–1798* (1991) and MARK DAVID HALL, *THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON, 1742–1798* (1997). Of these four monographs, Hall’s is the most careful and informative.

(3) *Book Chapters*. Four recent books devote chapters to a discussion of Wilson’s constitutional theories. See JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* 96–140 (1990); SHANNON C. STIMSON, *THE AMERICAN REVOLUTION IN THE LAW: ANGLO-AMERICAN JURISPRUDENCE BEFORE JOHN MARSHALL* 127–36 (1990); SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 341–78 (1993); JAMES H. READ, *POWER VERSUS LIBERTY: MADISON, HAMILTON, WILSON, AND JEFFERSON* 89–118 (2000). Of these four books, I have found Nedelsky and Stimson to be the most insightful. John Witt devotes a chapter to the ramifications of the “Fort Wilson” incident. See JOHN FABIAN WITT, *PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW* 15–82 (2007).

(4) *Articles*. Only a handful of scholarly articles were published about Wilson before 1945; many of them are book reviews or works of local history. See Hampton L. Carson, *The Works of James Wilson*, 35 AM. L. REG. 633 (1896); Andrew C. McLaughlin, *James Wilson*



ture, valuable though it sometimes is, comes nowhere close to addressing the profound questions raised by Farrand's remarks. If it is true that James Wilson and James Madison were the two dominant intellects at the Philadelphia Convention—if it is true that Wilson is a constitutional thinker comparable in importance to the greatest of

in the Philadelphia Convention, 12 POL. SCI. Q. 1 (1897); John M. Harlan, *James Wilson and the Formation of the Constitution*, 34 AM. L. REV. 480 (1900); James De Witt Andrews, *James Wilson and His Relation to Jurisprudence and Constitutional Law*, 49 AM. L. REG. 708 (1901); James Oscar Pierce, *James Wilson as a Jurist*, 38 AM. L. REV. 44 (1904); Lucien Hugh Alexander, *James Wilson, Patriot, and the Wilson Doctrine*, 183 N. AM. REV. 971 (1906); Burton Alva Konkle, *The James Wilson Memorial*, 55 AM. L. REG. 1 (1907); Hampton L. Carson, *Oration on James Wilson*, 55 AM. L. REG. 35 (1907); M. C. Klingelsmith, *James Wilson and the So-Called Yazoo Frauds*, 56 U. PA. L. REV. & AM. L. REG. 1 (1908); Randolph C. Adams, *The Legal Theories of James Wilson*, 68 U. PA. L. REV. & AM. L. REG. 337 (1920); Hampton L. Carson, *James Wilson and James Iredell. A Parallel and a Contrast*, 45 PA. MAG. HIST. & BIOGRAPHY 1 (1921); Randolph G. Adams, *Introduction to SELECTED POLITICAL ESSAYS OF JAMES WILSON* 1–42 (Randolph G. Adams ed., 1930); James Bryce, *James Wilson: An Appreciation*, 60 PA. MAG. HIST. & BIOGRAPHY 358 (1936); Richard M. Gummere, *Classical Precedents in the Writings of James Wilson*, 32 COLONIAL SOC'Y MASS.: TRANSACTIONS 525–38 (1937); Arnaud B. Leavelle, *James Wilson and the Relation of the Scottish Metaphysics to American Political Thought*, 57 POL. SCI. Q. 394 (1942).

A modest upsurge in Wilson scholarship occurred after the publication of the biography by Smith in 1956 and with the re-publication in 1967 of Wilson's writings in an edition edited by Robert McCloskey. THE WORKS OF JAMES WILSON, *supra* note 3. McCloskey wrote two essays which are perhaps the most perceptive pieces of Wilson scholarship, and an excellent place to begin. See Robert Green McCloskey, *Introduction to 1 THE WORKS OF JAMES WILSON*, *supra* note 3, at 1–48; Robert G. McCloskey, *James Wilson*, in 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789–1969: THEIR LIVES AND MAJOR OPINIONS 79 (Leon Friedman & Fred L. Israel eds., 1969). The re-publication of the *Works* was followed by a handful of articles in the 1970s. See John V. Jezierski, *Parliament or People: James Wilson and Blackstone on the Nature and Location of Sovereignty*, 32 J. HIST. IDEAS 95 (1971); Alfons Beitzinger, *The Philosophy of Law of Four American Founding Fathers*, 21 AM. J. JURIS. 1 (1976); Ralph Rossum, *James Wilson and the "Pyramid of Government": The Federal Republic*, 6 POL. SCI. REVIEWER 113 (1976); George Dennison, *The "Revolution Principle": Ideology and Constitutionalism in the Thought of James Wilson*, 39 REV. POL. 157 (1977).

Since the mid-1980s, there have been a number of articles exploring the intellectual sources of Wilson's ideas. See Stephen A. Conrad, *Polite Foundation: Citizenship and Common Sense in James Wilson's Republican Theory*, 1984 SUP. CT. REV. 359; George W. Carey, *James Wilson's Political Thought and the Constitutional Convention*, 17 POL. SCI. REVIEWER 49 (1987); Robert E. DiClerico, *James Wilson's Presidency*, 17 PRESIDENTIAL STUD. Q. 301 (1987); Daniel J. McCarthy, *James Wilson and the Creation of the Presidency*, 17 PRESIDENTIAL STUD. Q. 689 (1987); Stephen A. Conrad, *Metaphor and Imagination in James Wilson's Theory of Federal Union*, 13 LAW & SOC. INQUIRY 1 (1988); Garry Wills, *James Wilson's New Meaning for Sovereignty*, in CONCEPTUAL CHANGE AND THE CONSTITUTION 99–106 (Terence Ball & J. G. A. Pocock eds., 1988); Roderick M. Hills, Jr., *The Reconciliation of Law and Liberty in James Wilson*, 12 HARV. J.L. & PUB. POL'Y 891 (1989); Shannon C. Stimson "A Jury of the Country": *Common Sense Philosophy and the Jurisprudence of James Wilson*, in SCOTLAND AND AMERICA IN THE AGE OF THE ENLIGHTENMENT 193–208 (Richard B. Sher & Jeffrey R. Smiten eds., 1990); Stephen A. Conrad, *James Wilson's "Assimilation of the Common-Law Mind"*, 84 NW. U. L. REV. 186 (1990).

his contemporaries—then one would expect his contributions and his intellectual legacy to have received the same intense scrutiny. But when one contemplates the hundreds of books and thousands of articles that have been written about Jefferson, Hamilton and Adams—when one contemplates the vast literature devoted to the three pages of Madison's *Federalist No. 10*—then the secondary literature on Wilson can only be viewed as surprisingly sparse and uneven.

This neglect of Wilson is especially surprising when we add to his contributions to the actual drafting of the Constitution in 1787 and the analysis he offers of its theoretical underpinnings in his *Lectures on Law*. Of the delegates to the Convention, only three—Hamilton, Madison, and Wilson—attempted to provide a detailed theoretical defense of the final document. In certain respects Wilson was the most favorably placed of the three to do so. Hamilton and Madison wrote with a polemical purpose, attempting to persuade the people of New York to ratify the Constitution; they were not free to express their unvarnished view of the Constitution, which historians have long known to have been significantly more negative in private than in the pages of *The Federalist*.<sup>55</sup> Wilson, in contrast, prepared his *Lectures* after the Constitution had already been safely ratified, and his remarks were addressed to a more academic audience. He was therefore more free to speak his mind and to explore issues of theoretical nuance. Furthermore, Wilson appears to have been a more genuinely enthusiastic supporter of the Constitution; certainly more than Hamilton, and probably more than Madison. (This is a fact which, by the way, provokes the suspicion that Wilson may have walked away from the Convention having gotten more of what he initially wanted than did his more famous colleagues.)

What are the reasons for this continuing neglect of Wilson? First is the undignified circumstances surrounding his downfall. His life, which ended with the spectacle of a justice of the Supreme Court hounded from state to state by his creditors, does not lend itself to the obvious sort of heroic biography. He did not serve as President, build Monticello, conduct complex diplomatic negotiations during the French Revolution, or die dramatically in a duel. His personality was cerebral, bookish, and aloof, and his most important accom-

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55 For Hamilton's reservations, see his remarks in the Convention, *passim*, and especially his concluding comments on the final document. 2 CONVENTION RECORDS, *supra* note 24, at 645–46 (“No man’s ideas were more remote from the plan than [Hamilton’s] own were known to be”). Madison’s disappointment is the dominant theme in his letters to Jefferson in the months following the Convention; see the remarks quoted *supra* note 44.

plishments took place out of public view. Occasionally historians invoke his financial dealings to justify the neglect of his writings. For example:

Wilson's own fatal flaw, his feverish drive for financial speculations and for get-rich-quick methods that were devoid of scrupulous honesty and of a decent regard for public interest—the flaw that brought down on him his tragic, closing days—goes far to explain why he was distrusted in his own time and thenceforth persistently unwelcome in 'America's Olympus.' Wilson *talked* like a wholehearted majoritarian democrat, to be sure. . . . But James Wilson's words and deeds—his overtly pure moral principles, his greed to scramble for wealth, power, and station, his thought and conduct—were *worlds* apart. His other great contemporaries, notably Jefferson, Madison, and Adams, were men of character as well as of spoken and written ideals, which does not mean that they were faultless or beyond criticism. Americans, and historians, cannot afford to forget the transcendent reality of character as an elemental force in the history of intellect, as of everything else.<sup>56</sup>

But this analysis by a distinguished historian will scarcely stand up to scrutiny. Yes, it is true that Wilson speculated unsuccessfully in Western lands. That is to say, he borrowed money from investors like Pierce Butler who loaned it to him in the hope that he would make them rich. Pierce Butler was hardly a starving widow: he was a sophisticated and wealthy investor, with massive holdings in land and slaves. (He was also a delegate to the Philadelphia Convention, and contributed the Fugitive Slave Clause.) The speculations failed, and Wilson, in an age that still knew debtor's prisons, paid the heaviest price. Most of his debts appear to have been paid off after his death. No doubt his reputation would stand higher today, and he would deserve to be included among the "men of character" if he had arranged instead to acquire his wealth in a more genteel manner—say, like Madison and Jefferson, by the labor of hundreds of inherited slaves. But quite apart from these biographical issues, it is far from clear that one can adequately assess the quality of Wilson's constitutional thought—of the contributions he made at the Philadelphia Convention, or of the quality of the analysis he provided in his academic writings—simply by gesturing towards his unsuccessful business affairs.<sup>57</sup>

<sup>56</sup> Adrienne Koch, Book Review, 74 AM. HIST. REV. 1710, 1711 (1969) (reviewing *THE WORKS OF JAMES WILSON*, *supra* note 3).

<sup>57</sup> I note in passing that Wilson's name occasionally provokes quite astonishing antipathy in the scholarly journals. One reviewer of Mark David Hall's investigation of Wilson's philosophy of law, HALL, *supra* note 54, reacted as follows:

[H]istorians and others who chronicle Wilson's actions see him as a talented, elitist, partisan office seeker, who, ever the spendthrift, sold his legal and political

A second reason for the neglect of Wilson is stylistic and literary. His most extensive piece of writing, the *Lectures on Law*, lacks the polish and sparkle we associate with the pen of Jefferson or "Publius." Not only was Wilson a less accomplished writer, but he never revised his lecture notes for publication. They are notes for classroom delivery, sometimes scribbled in haste, with shorthand indications of his sources, and with all the repetitions and digressions that are characteristic in this form of literature.<sup>58</sup> In addition, his *Lectures* are more

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skills to the wealthy and died a disgraced runaway bankrupt. Hall admits that Wilson's image as an aristocrat was shaped by his tardiness in supporting Independence; his opposition to Pennsylvania's democratic Constitution of 1776; his support for counter-majoritarian institutions and practices; his supercilious bearing and opulent dress; his posh carriage drawn by four horses; his political, economic and personal alliances with the rich and powerful; his opposition to a federal bill of rights; his lavish lifestyle and unquenchable speculative mania in western lands funded by unsecured loans from wealthy associates; and his unabashed pursuit of lucrative political appointments. . . . [The late Mel Bradford] cautioned against taking Wilson's writings literally because Wilson was "A dialectician who could 'bewilder truth in all the mazes of sophistry, and render the plainest proposition problematical.'" Such an image seems more in line with the James Wilson most historians know.

John P. Kaminski, Book Review, 17 J. EARLY REPUBLIC 693, 695 (1997) (reviewing HALL, *supra* note 54). But many other founders besides Wilson dressed well, lived expensively, and associated with opulent friends. George Washington himself lodged with Robert Morris during the Convention, and it is hard to see how Wilson was any worse in this regard than his peers. On the aristocratic tendencies of the founding generation, see generally GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1991), especially Chapter 1. But more importantly, Wilson's horses and the quality of his clothing can scarcely be invoked as arguments against an examination of the strengths and weaknesses of his political thought.

Although for the purposes of evaluating Wilson's contributions to American constitutionalism it is important to distinguish between his abstract theories and the biographical facts of his life, I note that many of his harshest critics have scarcely made the effort to do him justice even in biographical terms, and that his life does not lack elements of genuine heroism. When, as a young immigrant lawyer in 1774, he published his pamphlet denying *all* authority of the British Parliament to legislate in American affairs, he took a risk that could well have cost him dearly if events had unfolded differently. More significantly, during the War of Independence, in an atmosphere of public hysteria, a number of Quakers and alleged Tory sympathizers were placed on trial for treason, accused of having assisted the British army. Although Wilson had signed the Declaration of Independence, and thus was a very public enemy of the British, he nevertheless agreed to serve as defense counsel and tried energetically to save his clients from the gallows. Wilson, already a prosperous lawyer, had no need of the fees, and his work as a public defender now exposed him to the hostility of the more radical revolutionaries. In fact, a few months later, in the "Fort Wilson" incident, Wilson was himself nearly lynched because a patriotic mob suspected that he secretly harbored loyalist sympathies. Under the circumstances, his attempt to uphold the rule of law during wartime can only be considered an act of considerable personal bravery. See *supra* Part I.A-C.

<sup>58</sup> Wilson's *Lectures* were published posthumously by his son, Bird Wilson, in 1804, who worked from some sixty, hand-written notebooks of lecture notes. The 1804 edition has served as the basis for all subsequent editions of Wilson's collected works. See 1 THE

theoretical, more abstract than *The Federalist*. This is to be sure both a strength and a weakness. *The Federalist* provides a polished, tightly-reasoned, systematic commentary on the text of the Constitution. The *Lectures* are more diffuse. To oversimplify, Publius answered a narrowly framed question: "How is the *particular* scheme of constitutional government proposed by the Philadelphia Convention supposed to function?" Wilson in contrast asks: "What is republican government? What is the nature of the new legal system Americans are creating? What are its philosophical underpinnings, and how does it fit within the broad tradition of Western legal history?" Both sets of questions are important, and, of course, there is overlap between them. *The Federalist*, precisely because it is narrower, is of greater practical utility to anybody seeking a detailed line-by-line commentary on some piece of Constitutional text; so it is not altogether surprising that it should have received more attention.

These various facts, however, although they may *explain* the neglect of Wilson, do not add up to a compelling *justification*. Regardless of the dismal circumstances of his end, and regardless of the literary style of his lecture notes, his writings are among the most important contributions to constitutional theory of the founding era and deserve attention irrespective of his own personal finances. In order to estimate Wilson's contributions correctly, it is necessary to make sense in particular of his two greatest achievements: his contributions to the Constitutional Convention of 1787 and his *Lectures on Law* of the early 1790s.

In this Article I shall make a start (it is only a start) on the first of these topics. The aim is to provide a detailed account of his concrete proposals and arguments made at the Convention and to make a close comparison of what Wilson proposed (and his reasons for proposing it) to what Madison proposed (and his reasons for proposing it). Although Madison and Wilson were close allies, and although their proposals frequently overlapped, even in the opening weeks one can see an important divergence in their underlying assumptions. In certain ways, indeed, the so-called "Great Compromise" of July 16 was not so much a compromise as a resounding defeat for Madison's Virginia Plan. It was also a defeat for Wilson, but a defeat that left a salvageable residue. The subsequent history of the Convention is in important respects a history of Madison's coming to adopt the analysis and the arguments of Wilson. It is important to lay out the evidence

for Wilson's contributions in some detail, because otherwise he becomes too readily assimilated to the "large-state view" of the Constitution, and one thereby loses the distinctive features of his analysis. The Constitutional Convention proceeded with extraordinary rapidity, and, as Madison remarked years afterwards, there were few "who did not change in the progress of discussions the opinions on important points which they carried into the Convention [and] . . . [f]ew who, at the close of the Convention, were not ready to admit this change as the enlightening effect of the discussions."<sup>59</sup> For that reason, it is important to attempt to understand the James Wilson of the Convention independent of his later views; in this Article I shall restrict attention to the actions and arguments he made in 1789. Only when this task has been completed can one turn to the *Lectures* in order to understand the deeper mechanisms of his philosophical theory, but that matter will be deferred to a subsequent article.

### III. THE CONSTITUTIONAL CONVENTION

#### A. *The Nature of the Documentary Evidence*

Before we turn to the details of the Constitutional Convention itself, it will be helpful to consider two preliminary matters. The first concerns the nature of our direct evidence for Wilson's views at the Convention. The standard documentary record of the Convention was assembled roughly a century ago by Max Farrand.<sup>60</sup> It consists of three sorts of documents: (1) The official *Journal* of the Convention's proceedings. This *Journal* was somewhat carelessly recorded. It reports the official tally of motions and votes, but it gives no details of the supporting speeches or arguments. (2) The contemporaneous notes of various "lesser" delegates to Philadelphia, for example, Robert Yates, Rufus King, John Lansing, and James McHenry. These sets of notes are of varying quality. They are in general somewhat sketchy, and none covers the entire proceedings from May to September. The most extensive are the notes by Robert Yates. After his death, they were edited and published in 1821 by "Citizen Genet,"

<sup>59</sup> 3 CONVENTION RECORDS, *supra* note 24, at 455. The quotation occurs in a document by Madison entitled "General Remarks on the Convention"; the document is undated, but appears to have been written around 1821, when Madison was preparing his *Notes* for publication.

<sup>60</sup> A supplementary volume, edited by James H. Hutson, was issued in 1987. SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787 (James H. Hutson ed., 1987) [hereinafter SUPPLEMENT].

the flamboyant refugee from the French Revolution, who sought to deploy them both against James Madison and against his own enemies in New York state politics. Only two pages of Yates's original manuscript survive, and they make it clear that Genet extensively rewrote the text before publication, thus making it unreliable as an independent historical source.<sup>61</sup> (3) James Madison's own *Notes* of the debates. These are by far our most important single source of information. Madison kept notes throughout the entire proceedings, and he entered into more detail than any of the other sources. He described his method of taking notes as follows:

I chose a seat in front of the presiding member, with the other members, on my right and left hand. In this favorable position for hearing all that passed I noted in terms legible and in abbreviations and marks intelligible to myself what was read from the Chair or spoken by the members; and losing not a moment unnecessarily between the adjournment and reassembling of the Convention I was enabled to write out my<sup>62</sup> daily notes during the session or within a few finishing days after its close.

It is known that Madison lightly revised his *Notes* at several points between 1819 and his death in 1836, but the changes were principally to bring his tallies of the votes into line with the official *Journal*, which was published in 1819. His original 1787 manuscript still survives and shows no signs of the deliberate subsequent falsification that vitiates the notes by Yates.<sup>63</sup>

But still there are inherent limitations to Madison's *Notes*, and it is important to keep them in mind. His practice, as he says, was to sit below the president's chair and to make abbreviated notes of speeches as they were delivered on the floor. In the evening, after the day's business was done, he would then write up his notes in a fuller form. Some delegates, after delivering a set speech, would give him their own copy to incorporate into his *Notes*, but most speeches Madison recorded as they were delivered. This method has several obvious shortcomings. First, it gives us no information about the activities that took place off the Convention floor: discussions were certainly held outside the hall, and bargains struck, but we have almost no evidence about the details of these transactions. Second, Madison

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61 The Yates notes are discussed at length in James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1 (1986).

62 1 CONVENTION RECORDS, *supra* note 24, at xvi.

63 William Winslow Crosskey, in his 3 POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 388 (1980), charged Madison with having fabricated his *Notes* long after the fact. Crosskey gave no persuasive evidence for his sensational accusations, which are effectively demolished by Hutson, *supra* note 61, at 25-33.

on average recorded only five or six printed pages of notes each day. This means that his *Notes* are far from a verbatim transcript of what was said, and rather represent his summary of what he understood to be the speaker's main points. His principal responsibility was not as a stenographer, but as a delegate to the Convention; he had to give thought to his own speeches and to his replies to the arguments being made from the floor. Doubtless his attention wandered at times. Third, Madison could not record his own remarks while he was speaking. Presumably he would write them out in the evening, so that his *Notes* would give a fuller account of his own views than those of the other speakers, and it is possible that he would have elaborated on points beyond what he actually said on the floor.<sup>64</sup> These facts mean that, as we search for Wilson's detailed contributions to the Philadelphia Convention, the documentary record is far from ideal: the Madison *Notes* are the best evidence we have, but it should be borne in mind that they can represent only a brief summary of what he in fact said.

There is a particular aspect to this problem of Madison's *Notes* that should be specially emphasized. Madison recorded only what happened on the floor; not only does he not record informal conversations, but he also does not record the proceedings of the various committees. This gap, as we shall see, is especially important for the proceedings of the Committee of Detail, which significantly rewrote the draft of the Constitution. The ten days of its deliberations are exceedingly important: in certain respects perhaps the most important episode of the entire Convention. But Madison was not a member of this Committee, and all we are left with to understand its proceedings is a number of drafts, most of them partial, of the Committee's work. The effect of such omissions has been to skew the attention of schol-

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64 One example will illustrate the problem. On June 6, Madison records a long speech in which he described the famous theory of faction that was eventually to appear as *Federalist No. 10*. The surviving notes for that day of other participants record only fragments of the speech, and even Madison's *Notes* do not show that it elicited any reaction from the other delegates. In Madison's *Notes*, as printed by Farrand, the speech fills two pages. In the same edition, the notes of Hamilton give it six lines; Yates, six lines; Pierce, five lines; King, four lines; and Lansing does not mention it at all. See 1 CONVENTION RECORDS, *supra* note 24, at 134-46. How are we to explain this lack of impact of what became Madison's most celebrated contribution to republican political theory? Perhaps he gave an abbreviated version of the speech on the floor, and then expanded his remarks in the *Notes*. Or perhaps the published remarks record what he actually said, but only *appear* to report a long speech because all the other speeches that day were recorded in a summary form. Or perhaps the other takers of notes did not grasp the significance of his remarks, and so did not bother to write them down. Any of these conjectures is compatible with the written record, and it is impossible to say for certain which is correct.



ars towards the things that were at the center of Madison's attention—which inevitably means both the things that he happened to witness, and the things that appeared important to him, given his general understanding of what the Convention was intended to accomplish.

The second preliminary matter is more subtle. The Constitutional Convention, at one level, can be viewed as reflecting a clash of powerful material interests—property owners against the poor, slave states against free states, states with vast claims to western land against the “landless” states of the coast, maritime states against inland states, large states against small states, North against South, East against West. These powerful social, economic, regional, and class antagonisms were central to the proceedings and structured its debates. But it is important not to exaggerate the point, and especially not to reduce the delegates to mere reflections of some abstract array of impersonal forces. In particular, a figure like James Wilson is far too subtle, and moved by far too many complicated motives, for his behavior to be accurately depicted in this way. (Indeed, the example of Wilson shows the methodological inadequacies of studies of the Convention that focus their attention primarily on the statistical analysis of voting behavior. Wilson's voting pattern is highly similar to Madison's, but as we shall see this surface similarity in voting behavior masks deep and important differences in their underlying constitutional theories.) To put the point differently: if a figure like Wilson is motivated by interests, he has some degree of choice about *which* interests he wishes to identify himself with; and at least on some occasions he appears to have thought of himself less as a “propertied Philadelphia lawyer” or a “citizen of Pennsylvania” or a “large-state delegate” than as a “citizen of the United States” or even as a representative of the future millions who would one day settle the Western interior.

### *B. Before the Convention*

Let us now turn to the Constitutional Convention itself. I begin with an important preliminary matter. In assessing the relative contributions of Wilson and Madison to the drafting of the Constitution, it is important to try to understand the extent to which they were explicitly acting as strategic allies. (Of course, they might have been allies on some issues and not on others; and each might also have formed alliances with other delegates that on occasion would pull them apart. Or they might have voted similarly on certain issues, but without any explicit collaboration.) And if they were acting as allies,

one would like to know, issue by issue, which of them was the dominant partner—whether Wilson was “Madison’s ablest supporter,” or whether he played a less subordinate role. These are difficult questions, and the evidence for answering them is incomplete; but as we proceed we must keep them in mind, and try to answer them as well as the evidence permits.

The issue already arises even before the formal start of the proceedings. The Convention was scheduled to begin on May 14. In the months leading up to the Convention, Madison served as a delegate to Congress in New York, where he followed what he called the “unsocial plan” of devoting all his spare time to reading and preparing for the Philadelphia Convention.<sup>65</sup> This relatively brief period of intense study seems to have been the time when he developed many of his central ideas about constitutional government, and he sketched some of his proposals for the upcoming Convention in letters to Thomas Jefferson, Edmund Randolph, and George Washington.<sup>66</sup> On April 15 he wrote to Randolph suggesting that the Virginia delegation arrive in Philadelphia several days early in order to be “prepared with some materials for the work.”<sup>67</sup> He himself left New York at the beginning of May, and arrived in Philadelphia on May 5.<sup>68</sup>

When the Convention opened on May 14, only two delegations were present: those of Virginia and Pennsylvania. (Wilson, a resident of Philadelphia, was present throughout. In the opening weeks he played host to at least one major delegate, John Rutledge of South Carolina. We shall see the significance of this fact later.) It was decided to adjourn until the 25th to allow time for the other delegations to arrive.<sup>69</sup> Thus, the Virginia delegation discovered it had an additional ten days to plan strategy, and it is known from contempo-

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65 “The family in which I am placed is I daresay an agreeable one, but I almost hesitate in deciding that to be an advantage, as it may expose the unsocial plan I have formed to the greater reproach.” Letter from James Madison to Eliza House Trist (Feb. 10, 1787), in 9 THE PAPERS OF JAMES MADISON, *supra* note 47, at 259 (footnote omitted).

66 Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), *id.* at 317–22; Letter from James Madison to Edmund Randolph (Apr. 8, 1787), *id.* at 368–71; Letter from James Madison to George Washington (Apr. 16, 1787), *id.* at 382–87.

67 *Id.* at 379. His full statement was: “Virg[ini]a ought not only to be on the ground in due time, but to be prepared with some materials for the work of the Convention. In this view I could wish that you might be able to reach Philad[elphia] some days before the 2d. Monday in May.” *Id.*

68 A letter to William Irvine, dated May 5, 1787, indicates that Madison had just arrived in Philadelphia, having left New York on May 2. *See id.* at 409–10.

69 1 CONVENTION RECORDS, *supra* note 24, at 1.

rary documents that they made good use of the opportunity.<sup>70</sup> From these meetings emerged the "Virginia Plan" that Randolph presented to the Convention on May 29. The content of the plan is very close to the ideas that Madison had proposed in his letters to Randolph and Washington in April, and most historians believe that the Virginia Plan was largely Madison's handiwork. Although many of its specific provisions were to be rejected or modified, its central idea—that the convention should design a genuine national government, supreme over the states, rather than merely tinkering with the Articles of Confederation—was never seriously challenged, and it influenced the entire course of the proceedings.

Madison in later years nevertheless repeatedly described the plan as a *collaborative* effort of the Virginia delegation,<sup>71</sup> and it is important to see that he had strong reasons to do so, both at the time and in his subsequent recollections. By allowing Governor Randolph to present the proposals as the "Virginia Plan," he not only secured the support of the other members of his delegation, but was also able to present the Convention with a plan that possessed at least the implicit support of General Washington. As virtually every subsequent historian of the Convention has observed, the support of Washington was essential to the success of the proceedings: if the relatively junior Madison had presented his ideas as the "Madison Plan," they would likely have met the same fate as the "Pinckney Plan," which was immediately tabled and forgotten. In later years, a different set of considerations was in play. The Virginia Plan was strongly national in tendency, calling for the establishment of a powerful central government and for a diminution in the power of the states. In 1787, Madison's views on national government were very different from what they eventually became (and of course he and the arch-nationalist Hamilton were to collaborate in writing *The Federalist*). Within a few years of the ratification of the Constitution, however, Madison had broken with Hamilton, joined forces with Jefferson, and emerged as one of the most prominent defenders of states' rights. Whether Madison's later states' rights views can be reconciled with the nation-

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70 Thus George Mason wrote to George Mason, Jr., on May 20, 1787: "The Virginia deputies (who are all here) meet and confer together two or three hours every day, in order to form a proper correspondence of sentiments; and for form's sake, to see what new deputies are arrived, and to grow into some acquaintance with each other, we regularly meet every day at three o'clock." 3 CONVENTION RECORDS, *supra* note 24, at 22–23.

71 See, for example, the various references given in 1 CONVENTION RECORDS, *supra* note 24, at 18 n.8, or Madison's letter of June 5, 1835 to W.A. Duer, reprinted in 3 CONVENTION RECORDS, *supra* note 24, at 534–37.

alist views he held in 1787 is, of course, a famous and disputed question that cannot be addressed here,<sup>72</sup> but in his later years he had reason to distance himself from the seemingly nationalist tendency of the Virginia Plan by calling attention to its having enjoyed the support of the entire Virginia delegation.<sup>73</sup>

A similar point holds for another aspect of Madison's pre-Convention planning. His strategy depended upon rapidly overpowering the small states and pressuring them to abandon the principle of one-state-one-vote. He put the point bluntly in his letter to George Washington:

I am ready to believe that such a change would not be attended with much difficulty. A majority of the States, and those of greatest influence, will regard it as favorable to them. To the Northern States it will be recommended by their present populousness; to the Southern by their expected advantage in this respect. The lesser States must in every event yield to the predominant will.<sup>74</sup>

Madison was to follow precisely this strategy during the opening weeks of the Convention. The hope evidently was to form a coalition of the three largest states (Virginia, Pennsylvania, Massachusetts) and three southern states (North Carolina, South Carolina, Georgia) and then push through the needed reform rapidly, forcing the smaller states to "yield to the predominant will."<sup>75</sup> The point is important because very early in the recorded proceedings an alliance on this point emerged between the Virginia and Pennsylvania delegations, and in particular between Madison and Wilson. Wilson, as we shall see, took the lead in attempting to force the smaller states to yield; at one point he threatened that the large states might simply choose to unite without their smaller neighbors. This raises the question of whether he and Madison planned their strategy in advance. We have no direct evidence, and in fact know little about the dealings that took place off the Convention floor. But there is the following circumstantial evidence: we know, first, that Madison's strategy depended upon an alliance with Pennsylvania; second, that Wilson and Madison knew one another and had been close colleagues in the Confederation

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72 The issue, often called the "Madison Problem," is discussed by all Madison biographers. See, e.g., IRVING BRANT, *JAMES MADISON* (6 vols., 1941–61); KETCHAM, *supra* note 40; JACK N. RAKOVE, *JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC* (2007).

73 Douglass Adair makes a similar point with regard to Hamilton's unwillingness to acknowledge the authorship of specific numbers of *The Federalist*. Adair, *supra* note 39, at 99–100.

74 Letter from James Madison to George Washington (Apr. 16, 1787), in 9 *THE PAPERS OF JAMES MADISON*, *supra* note 47, at 383.

75 *Id.*

Congress; third, that they were both in Philadelphia, living a few streets apart for nearly a month before the start of the Convention;<sup>76</sup> and fourth, that each was to be the other's strongest public ally in the weeks that followed. Under the circumstances, it would be surprising if Madison and Wilson had *not* spoken privately, both before the opening of the Convention and after its start. We furthermore know that the Virginia and Pennsylvania delegations met at least once before the start of the Convention. In a later footnote to his *Notes* Madison wrote:

It was pressed by Gouverneur Morris and favored by Robert Morris and others from Pennsylvania, that the large States should unite in firmly refusing to the small States an equal vote [in the Constitutional Convention], as unreasonable, and as enabling the small States to negative every good system of Government. . . . The members from Virginia, conceiving that such an attempt might beget fatal altercations between the large & small States, and that it would be easier to prevail on the latter, in the course of the deliberations, to give up their equality for the sake of an effective Government . . . discountenanced & stifled the project.<sup>77</sup>

This footnote was most likely written in the 1820s, long after the actual event, and long after Madison had become the chief defender of states' rights. Madison does not mention his own earlier view that the smaller states "must give way"<sup>78</sup> to the larger, nor does he mention Wilson by name. Wilson was by that point long dead, and if Madison had entered into a strategic partnership with him in order to promote a strongly nationalist agenda, he would have had no particular wish to call attention to that fact in his later years.

### C. Act I. Monday, May 28 to Thursday, July 26

Let us now turn to the Convention itself. It is important to bear in mind that the Convention was a single, ongoing episode, punctuated by a number of important turning points. Historians of the Convention have not reached consensus about how the overall structure of the debates is to be partitioned. Most tend to see it as proceeding in three main phases. Clinton Rossiter's division is typical. The first

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76 During the Convention, Madison stayed at Mrs. House's lodgings at Fifth and Market Streets; Wilson lived on Chestnut Street between Fourth and Fifth Streets, about a block away. Madison's address is given in KETCHAM, *supra* note 40, at 190. SMITH, *supra* note 4, at 224, places Wilson on Market Street at Seventh, but the Wilson archive at the Historical Society of Pennsylvania makes it appear that he was still living at the Chestnut Street address until 1788. In either case, he and Madison were living no more than a short walk away.

77 1 CONVENTION RECORDS, *supra* note 24, at 10-11 & n.\* (May 28).

78 2 CONVENTION RECORDS, *supra* note 24, at 111 (July 25).

phase, from May 14–June 20 (“The Nationalist Assault”), represents the period during which the “nationalists”—i.e. the large-state delegates—attempted to achieve the goals of the Virginia Plan. Although there had been dissatisfaction expressed by the small-state delegates earlier (including the introduction of the “New Jersey Plan” on June 15, followed by its rejection on June 19), on Rossiter’s chronology the “grand debate” on small-state representation in the Senate began in earnest on June 21. The second phase (“Compromise and Creativity”) encompasses the period June 21–August 5, including the so-called “Connecticut Compromise” on July 16 (when the delegates narrowly agreed to the principle of equal state representation in the Senate, thus rejecting the core of Madison’s plan), and encompassing the work of the Committee of Detail, which consolidated the work of the Convention into a working draft that was presented to the delegates on August 6. The final phase (“Details, Details, Details”) extends from August 6–September 11, when the Convention debated the fine print of the Committee draft; there was a final coda (September 12–17, “Last Rites and Retrospect”) during which the text was polished and signed.<sup>79</sup>

This telling of the story of the Convention throws the emphasis upon the middle period—the crisis over proportional representation (which threatened more than once to derail the entire Convention), and the broad compromises reached by the delegates in the last weeks of July. There is a great deal to be said in favor of this chronology. It is the chronology naturally suggested by Madison’s *Notes*, and reflects Madison’s preoccupation with the issue of proportional representation in the Senate. In particular, it plays down the importance of the final phase, and of the work of the Committee of Detail. (Again, this is the natural impression one would take away from reading Madison’s *Notes*: he was not present at the deliberations of the Committee of Detail, and so can tell us nothing about its work.)

In the analysis that follows I shall employ a different partitioning of the Convention’s chronology. The aim is not to deny the important turning points of the standard histories—the vote on July 16 was a major event for Wilson as well as for the entire Convention—but rather to try to call attention to the work of the Committee of Detail, as a corrective to the optical illusion produced by its omission from the Madison *Notes*. I propose to view the Convention as proceeding

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<sup>79</sup> ROSSITER, *supra* note 1. The phrases in quotes are his chapter titles for the four chapters he devotes to the Convention itself. A similar partitioning is common in the scholarly and popular literature, and has been so at least since Farrand’s classic study, *supra* note 1.

in three main Acts. Act I encompasses the entire period from the start of the Convention on May 25 until the delegates adjourned on July 26 to allow the Committee of Detail to prepare a draft of the principles on which the Convention had agreed. Act I thus includes the initial skirmishing over the Virginia Plan; the introduction and defeat of the New Jersey Plan; the protracted and bitter arguments over state representation; the "compromise" of July 16; and the various subsidiary measures discussed and agreed to in the ten days before the adjournment. Act II encompasses the work of the Committee of Detail, and its significant rewriting of the work of the Convention. Act III is the response of the Convention to the draft produced by the Committee. I do not claim that this is the "right" periodization of the Convention, only that it will be a helpful device, as we try to understand the contributions of Wilson to the Constitution, for concentrating attention on the Committee of Detail.

*1. Act I, Part 1. The First Two Weeks: Monday, May 28 to Saturday, June 9*

As we turn to the Convention itself, I propose to start by paying especially close attention, day-by-day, to the arguments made during the first two weeks of the Convention, and in particular to the positions taken by Wilson and by Madison. There are two reasons for this. First, many of the themes that are characteristic for their approach to constitutional theory can already be seen, at least in outline, during the opening two weeks. Second, this period was relatively free of the later rancorous debates about proportional representation that were so important to the business of the Convention in the remainder of Act I, and that so bitterly divided the large states from the small states. In *those* debates, Wilson and Madison were very much on the same side, and there is little to be learned by observing the ways in which they repeatedly rose to support each other, often making the same points in slightly different language. But during the earlier period, when other issues were under discussion, we can see subtle and important contrasts between their respective positions. Those differences will enable us to understand better the differing ways in which the two delegates responded to the "Great Compromise" of July 16. So let us now look at the first two weeks in detail. I shall first lay out the principal speeches in chronological sequence, then turn to analysis. The later parts of Act I can then be treated more rapidly.

The first full day of business was Friday, May 25. George Washington was elected to preside over the Convention, and a committee was

appointed to prepare the rules of procedure. State delegations were still straggling in to Philadelphia, so the Convention adjourned until the following Monday. On Monday the standing rules were agreed to, including the important rule that voting in the Convention would be state-by-state.<sup>80</sup>

### *The Virginia Plan*

On Tuesday morning, May 29, the Convention made the important decision that its deliberations would be held in secret, a resolution to which it adhered with remarkable self-restraint throughout the summer, and indeed for decades after the Constitution had been ratified. Without this decision the delegates would have been less free to express their views or to change them in the course of the proceedings, and the entire enterprise would likely have foundered as news of their disagreements had filtered out to the respective states.

The rest of Tuesday was devoted to a detailed presentation by Edmund Randolph of the Virginia Plan.<sup>81</sup> He began with a careful enumeration of the defects of the Articles of Confederation, then set forth the Virginia proposals, which he presented as a recommendation that the Articles be “corrected & enlarged.”<sup>82</sup> The essence of the Virginia Plan was as follows:<sup>83</sup>

#### i. The Legislature

[2] The right of suffrage in the Legislature should no longer be, as in the Articles, one-state-one-vote, but rather should be based on proportional representation—proportional either to the number of free inhabitants in the state, or to the state’s quota of contribution to the national treasury. (The Virginia Plan did not decide between these alternatives.)

[3] The Legislature should consist of two branches.

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80 1 CONVENTION RECORDS, *supra* note 24, at 3–14 (May 25–28). It was this rule that Madison, in his later footnote, said the Virginians had urged the Pennsylvania delegation not to challenge.

81 For the Virginia Plan, see *id.* at 20–23 (May 29).

82 *Id.* at 20.

83 I have paraphrased slightly, and given in brackets Randolph’s numeration, omitting the less significant items. Various subsidiary matters, such as the length of legislative terms, or the exact supermajority required to override an Executive veto, were left by Randolph as blanks to be filled in later.



[4] The members of the first branch should be elected by the people of the states, and for a certain number of years they should not be eligible for re-election.

[5] The members of the second branch should be elected by the first branch from a number of persons nominated by the individual state legislatures. They should hold office for a sufficiently long term of years to secure their independence.

[6] Each branch should possess the right of originating legislation. The Legislature should have all the rights of the existing Confederation Congress and also the power to legislate in all cases where the separate states are incompetent. The National Legislature should also have the power to veto any law passed by any State Legislature if in the opinion of the National Legislature the law violates the articles of Union. The Legislature should have the power to call forth the military force of the Union against any state that fails to fulfill its duties.

## ii. The Executive

[7] A National Executive should be instituted. It should be chosen by the National legislature; it should be ineligible to serve a second term; it should have a general authority to execute the National laws.

[8] The National Executive and a certain number of the National Judiciary should sit as a "council of revision" with the authority to veto any act of the National Legislature (including attempts by the legislature to negative state laws). This veto can be overridden by a supermajority of both branches of the legislature.

## iii. The Judiciary

[9] A National Judiciary should be established, to be chosen by the legislature, consisting of one or more supreme courts and inferior courts. Judges are to hold their offices during good behavior. The Judiciary is to hear piracy cases, disputes between citizens and foreigners or citizens of other states, impeachments, and questions which may involve the national peace.

The remaining six articles concerned the admission of new states, the amendment process, and the mode of ratification of the Virginia proposals.

Full discussion of the Randolph plan did not occur until the next day, Wednesday, May 30. Randolph had presented his proposals as a scheme for *amending* the existing Articles of Confederation, but his

proposals in fact amounted to their eradication and to the creation of a new form of national government.<sup>84</sup> This fact was not lost on the Pennsylvania delegation, and Gouverneur Morris promptly moved that, instead of amending the Articles, the Convention agree that “a national Govern[ment] ought to be established consisting of a supreme Legislative Executive & Judiciary.”<sup>85</sup> This important proposal, which determined everything that followed, was promptly passed by essentially the large-state coalition Madison had envisioned: Massachusetts, Pennsylvania, and Virginia were joined by North and South Carolina and by Delaware. New York was divided (with Hamilton favoring the motion), and only Connecticut voted against.<sup>86</sup>

The rest of Wednesday and all of Thursday were given over to discussion of the national legislature, and specifically to initial skirmishing over the issue of proportional representation. Madison, seconded by Gouverneur Morris of Pennsylvania, and doubtless noticing the absence of several small-state delegations, moved that the Convention focus on the central issue: that the principle of one-state-one-vote be abandoned and that it be replaced with a proportional scheme of representation. The precise details of the proportional ratio (whether to inhabitants, free inhabitants, or the quota of contribution) could be worked out later. The delegates from Delaware raised some initial objections, pointing out that they were not permitted under their commission to vote for such a proposal. Madison then (repeating an argument he had already made in his letter to Washington) gave a lengthy speech pointing out that, although the principle of equal state votes may have been proper for a league among sovereign states, where the larger states could exert greater influence because of their greater size, in a truly national government this would improperly give a vote from a small state exactly the same power as a vote from a large state.<sup>87</sup> Madison’s speech seems to have been well received. Indeed, at the end of that day, the proposal to

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84 Charles Pinckney asked whether the Virginia Plan intended to abolish the states, and Randolph gave him the reassurance that this was so only to the extent that certain powers were to be given to the national government. *See id.* at 34 (May 30).

85 *Id.* at 35.

86 *Id.* New Hampshire, New Jersey, Maryland, and Georgia were not yet present, and Rhode Island did not send a delegation at all. The principal discussion on that day was terminological and involved the proper understanding of the terms “federal,” “national,” and “supreme.” During the Convention itself, and in confusing contrast to later usage, the proponents of a relatively loose league of states on the model of the Articles were referred to as “federalists”; the advocates of a strong central government were said to favor a “national” plan.

87 *Id.* at 37 (May 30).

abandon the Articles having already been carried by a large margin, Madison over-optimistically recorded in his *Notes* that only Delaware had raised any objections to proportional representation, and that the delegates "understood that in the event the proposed change of representation would certainly be agreed to . . . ." <sup>88</sup>

On Thursday, the Convention agreed rapidly to the proposal for a bicameral legislature, then turned to the question of how the lower house was to be selected. The Virginia Plan had proposed an election by the people. Roger Sherman of Connecticut called instead for an election by the state legislatures. Elbridge Gerry of Massachusetts, supporting Sherman, delivered a speech denouncing the "excess of democracy" and "the lev[e]ling spirit" implicit in the Virginia Plan. George Mason spoke in favor of popular election. <sup>89</sup> Wilson had until this point been almost entirely silent. He now rose to speak, and was henceforth to speak virtually every day and on virtually every major issue for the duration of the Convention. His remarks are important, and worth giving in full:

Mr. Wilson contended strenuously for drawing the most numerous branch of the Legislature immediately from the people. He was for raising the federal pyramid to a considerable altitude, and for that reason wished to give it as broad a basis as possible. No government could long subsist without the confidence of the people. In a republican Government this confidence was peculiarly essential. He also thought it wrong to increase the weight of the State Legislatures by making them the electors of the national Legislature. All interference between the general and local Governm[ents] should be obviated as much as possible. On examination it would be found that the opposition of States to federal measures had proceeded much more from the Officers of the States, than from the people at large. <sup>90</sup>

Wilson's "pyramid of government" is a striking metaphor, but it is important not to misinterpret it. It does not imply, as some have suggested, that the national government was to be permanent and unchanging, but rather that all its powers must so far as possible be made to rest on the broad basis of popular sovereignty. <sup>91</sup> At this stage

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88 *Id.* at 37–38 (May 30).

89 *Id.* at 48 (May 31). This was not quite Wilson's first remark at the Convention: on August 25 he had nominated Temple Franklin as the Convention's secretary. *Id.* at 4.

90 *Id.* at 49 (May 31) (footnote omitted).

91 Several commentators have treated Wilson's pyramid metaphor as the key to his thought. But in actuality, although his writing abounds in metaphors and similes, he used this particular trope only two or three times. As for the idea that he wished the constitutional structure to be permanent and unchanging, he repeatedly spoke in favor of the power of the people to abolish or change whatever form of government they happened to live under.

we are not yet in a position to unpack the full array of ideas that lie behind Wilson's remarks: we must wait until we have a better grasp of his position in its entirety. But his speech was immediately followed by an equally remarkable speech from Madison; the two speeches provide a subtle contrast that was to persist throughout the Convention:

Mr. Madison considered the popular election of one branch of the national Legislature as essential to every plan of free Government. He observed that in some of the States one branch of the Legislature was composed of men already removed from the people by an intervening body of electors. That if the first branch of the general Legislature should be elected by the State Legislatures, the second branch elected by the first—the Executive by the second together with the first; and other appointments again made for subordinate purposes by the Executive, the people would be lost sight of altogether; and the necessary sympathy between them and their rulers and officers, too little felt. He was an advocate for the policy of refining the popular appointments by successive filtrations, but thought it might be pushed too far. He wished the expedient to be resorted to only in the appointment of the second branch of the Legislature, and in the Executive & judiciary branches of the Government. He thought too that the great fabric to be raised would be more stable and durable if it should rest on the solid foundation of the people themselves, than if it should stand merely on the pillars of the Legislatures.<sup>92</sup>

There are at least two important contrasts already implicit in these brief, pregnant remarks of Wilson and Madison. First, whereas Wilson tacitly advocates a *general* principle of direct popular election, Madison is more reserved, and limits this principle to the selection of the popular branch of the legislature only. Second, in certain respects Wilson's metaphor of the pyramid is more applicable to Madison's conception than to Wilson's own. For Madison sees the national government as being *refined* by "successive *filtrations*"—with a narrowing taking place in the electoral base as the refinements are made.

At this stage, the remarks of Wilson and Madison are little more than a hint. Earlier in the spring, in his analysis of the *Vices of the Political System of the United States*, Madison had written:

An auxiliary desideratum for the melioration of the Republican form is such a process of elections as will most certainly extract from the mass of the Society the purest and noblest characters which it contains; such as will at once feel most strongly the proper motives to pursue the end of

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<sup>92</sup> *Id.* at 49–50 (May 31). Note that, despite the pyramid metaphor, it is Madison rather than Wilson who speaks explicitly of "stability and durability."

their appointment, and be most capable to devise the proper means of attaining it.<sup>93</sup>

How, precisely, this "extraction from the mass of the Society" was to take place, Madison did not specify in detail,<sup>94</sup> but it was central to his thought in a way it was not to Wilson and points to a fundamental difference in the underlying orientation of the two delegates, even as they agreed on the specific measure under discussion.

Despite some continuing resistance from Elbridge Gerry, the arguments of Wilson and Madison on this point prevailed, and the Convention 6-2-2 decided that the first branch should be elected by the people.<sup>95</sup>

The next major question was Randolph's Article 5, which proposed that the second branch of the legislature (i.e. the eventual Senate) should be elected by the first branch from persons nominated by the state legislatures. Some delegates expressed concern that too much power would be taken from the states, and they suggested that the Senate be chosen directly by the state legislatures. Randolph—on these points expressing views that were certainly shared by Madison—explained that the Senate was intended to be much smaller than the lower branch, "so small as to be exempt from the passionate proceedings to which numerous assemblies are liable."<sup>96</sup> The general idea, he said, was to provide a corrective to "the turbulence and follies of democracy."<sup>97</sup> These evils had plagued the United States in recent years, and a properly designed Senate seemed the best solution. Here, Randolph is echoing thoughts that had earlier been expressed in Madison's correspondence and doubtless discussed privately among the members of the Virginia delegation. We see Madison's idea of a "selective filtration" applied to the election of the Senate and offered as a solution to the turbulence of popular democracy.

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93 James Madison, *Vices of the Political System of the United States* (April 1787), in 9 THE PAPERS OF JAMES MADISON, *supra* note 47, at 357.

94 It is worthwhile to note in passing that Thomas Jefferson, in his *Notes on the State of Virginia*, also had proposed a scheme for filtering students through a system of education, with only the "best genius" in each class being promoted to the next level. He commented that, on his scheme, the crop of Virginia schoolchildren would be reduced to "twenty of the best geniuses . . . raked from the rubbish annually." Of those twenty, only the top ten would be permitted to go on to college. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 157 (Richmond, Va., J.W. Randolph 1853).

95 1 CONVENTION RECORDS, *supra* note 24, at 50 (May 31).

96 *Id.* at 51 (May 31).

97 *Id.*

Rufus King pointed out the practical difficulty of reconciling a small Senate with the idea of proportional representation, and Wilson, in reply, expressed his opposition to *both* parts of the Virginia Plan. The Senate, he said, should neither be nominated by the state legislatures, nor be elected by the first branch, but rather chosen directly by the people.<sup>98</sup> As to the difficulty pointed out by Rufus King, he had no specific proposal but thought that perhaps election districts could be formed that would cross state lines for Senatorial elections. At this point, we have the first sign of a clear difference between Madison and Wilson, with Wilson rejecting the “filtration” model and instead advocating that the principle of direct popular election be applied consistently to *both* branches of the legislature. Madison took the opportunity to make a conciliatory remark towards the smaller states: he pointed out that Wilson’s method had been tried in Virginia, and that it would be likely to destroy the influence of the smaller states, who would be outvoted within the enlarged electoral district. The Convention thereupon voted down the Virginia proposal, but did not yet adopt a substitute.

The Convention next took up Randolph’s Article 6 and the question of legislative power. Madison expressed both a wish for an explicit enumeration of powers, but also his doubts about whether such a list could be written. This was a shrewd tactical maneuver: by not at this point bringing up specific powers, he was able to secure general agreement that the legislature should have the powers necessary to a national government, but without entering into distracting debates about precisely what those powers should be. Remarkably, the clause embodying one of his favorite ideas and giving the national legislature the power to veto the laws of the state legislatures was at this point in the proceedings agreed to “with[out] debate or dissent.”<sup>99</sup>

As for the clause permitting the national government to use force against recalcitrant states, Madison on this point distanced himself from the Virginia Plan: “The use of force ag[ainst] a State, would look more like a declaration of war, than an infliction of punishment, and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound.”<sup>100</sup> Madison’s remarks on the use of force are curious, since he was the principal architect of the Virginia Plan, and since he had expressed

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98 *Id.* at 52 (May 31). Wilson’s proposal was to fail at Philadelphia, but ultimately to be adopted in the Seventeenth Amendment.

99 *Id.* at 53–54 (May 31).

100 *Id.* at 54.

support for the idea of the use of force in his earlier private correspondence.<sup>101</sup> Perhaps he was now having second thoughts, or perhaps his remarks were intended as a conciliatory gesture towards the delegates from the smaller states. Whatever Madison's motives, Wilson was silent during these discussions of legislative power, and he had nothing to say about Article 6.<sup>102</sup>

### *The Executive*

For the next three days, from Friday through Monday, the discussions would revolve around the Executive, and now Wilson rather than Madison took the lead. The design of the presidency was one of the most difficult issues confronted by the Convention, and in fact it consumed more time than any other issue (including the issue of proportional representation). Madison's proposals in his correspondence for a national Executive were remarkably sketchy, and in his letter to Randolph he had confessed:

A National Executive will also be necessary. I have scarc[ely] ventured to form my own opinion yet either of the manner in which it ought to be constituted or of the authorities with which it ought [to be] clothed.<sup>103</sup>

Indeed, Articles 7 and 8 of the Virginia Plan said little more than that an Executive should exist, and that it should have the power of a veto. Unspecified were: the term of office; the manner of election; who should make the election; whether and on what grounds the Executive could be removed from office, and, if so, by whom; whether the Executive should be eligible for re-election; and even whether there should be one Executive or many. Wilson immediately moved to fill

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101 In his April 16 letter to Washington he had said, not without some ambivalence, In like manner the right of coercion should be expressly declared. With the resources of Commerce in hand, the national administration might always find means of exerting it either by sea or land; But the difficulty & awkwardness of operating by force on the collective will of a State, render it particularly desirable that the necessity of it might be precluded. Perhaps the negative on the laws might create such a mutuality of dependence between the General and particular authorities, as to answer this purpose. Or perhaps some defined objects of taxation might be submitted along with commerce, to the general authority.

Letter from James Madison to George Washington (Apr. 16, 1787), in 9 THE PAPERS OF JAMES MADISON, 9 April 1786 — 24 May 1787, at 385 (Robert A. Rutland et al. eds., 1975).

102 See 1 CONVENTION RECORDS, *supra* note 24, at 54 (May 31). This is a surprising silence, especially in view of Wilson's vigorous arguments in the early 1780s about the implicit powers of the Confederation Congress in the debates over the chartering of the Bank of North America. See *supra* note 18 and accompanying text.

103 Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in 9 THE PAPERS OF JAMES MADISON, *supra* note 101, at 370. Madison repeats the remark in almost identical language in his letter to Washington (second alteration in original).

this last omission and proposed that the Executive consist of a single person. This was a particularly delicate subject, since one of the great fears of the Convention—expressed forcefully by Benjamin Franklin<sup>104</sup> and James Mason<sup>105</sup> among others—was of reconstituting the very form of monarchical government against which they had rebelled. Madison's *Notes* record that a "considerable pause" followed Wilson's motion.<sup>106</sup> Prodded by Franklin, and by John Rutledge's animadversion "on the shyness of gentlemen on this and other subjects,"<sup>107</sup> Roger Sherman gave his view that the Executive should be both appointed by and accountable to the national legislature and that the legislature should be allowed to decide how many executive magistrates it wished to appoint. Wilson replied as follows:

Mr. Wilson preferred a single magistrate, as giving most energy dispatch and responsibility to the office. He did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c. The only powers he conceived strictly Executive were those of executing the laws, and appointing officers, not (appertaining to and) appointed by the Legislature.<sup>108</sup>

A flurry of further proposals now followed. Elbridge Gerry proposed annexing a Council to the Executive (modeled on the British Privy Council).<sup>109</sup> Randolph denounced Wilson's plan of a single Executive, calling it "the foetus of monarchy."<sup>110</sup> Wilson replied that a single Executive, "instead of being the fetus of Monarchy would be the best safeguard against tyranny,"<sup>111</sup> for it would place responsibility clearly and accountably in the hands of a single person, rather than in a council where it could be hidden. Wilson's motion for a single magistrate was postponed. Madison then proposed that, before deciding on Wilson's motion, an attempt be made to fix the extent of Executive authority. He accordingly moved that the Executive be granted the "power to carry into effect[] the national laws[] [and] to appoint to offices in cases not otherwise provided for . . ."<sup>112</sup> Wilson seconded Madison's motion, which easily carried.

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104 1 CONVENTION RECORDS, *supra* note 24, at 83 (June 2).

105 *Id.* at 101 (June 4).

106 *Id.* at 65 (June 1).

107 *Id.*

108 *Id.* at 65–66 (June 1). I note in passing, *pace* some modern theorists of the "unitary executive," that Wilson clearly views the war power as legislative.

109 *Id.* at 66.

110 *Id.*

111 *Id.*

112 *Id.* at 67 (June 1).



The next topic was the manner of appointing the Executive. Here again Wilson spoke first:

Mr. Wilson said he was almost unwilling to declare the mode which he wished to take place, being apprehensive that it might appear chimerical. He would say however at least that in theory he was for an election by the people; Experience, particularly in N[ew] York and Mass[achusetts], shewed that an election of the first magistrate by the people at large, was both a convenient & successful mode. The objects of choice in such cases must be persons whose merits have general notoriety.<sup>113</sup>

Again, we see a divergence from the position of Madison—and indeed of every other delegate who spoke to the question at the Convention. Wilson is here willing to extend the principle of popular, democratic election not only to both branches of the legislature, but to the selection of the National Executive as well. His proposal, as he realized, stood no chance of success. Roger Sherman then reiterated his support for an appointment by the national legislature, “and for making [the Executive] absolutely dependent on that body”<sup>114</sup>—precisely the outcome Wilson wished at all costs to avoid. Wilson, still taking the lead on the question of the Executive, now moved for a relatively short three-year term of office.<sup>115</sup> The Convention, however, for the time being, settled on a term of seven years. Wilson at the end of the day repeated his central point:

Mr. Wilson renewed his declarations in favor of an appointment by the people. He wished to derive not only both branches of the Legislature from the people, without the intervention of the State Legislatures (but the executive also;) in order to make them as independent as possible of each other, as well as of the States.<sup>116</sup>

Madison's own notes of this day's proceedings show him taking little part in these discussions, leaving the initiative to Wilson. Perhaps this fact reflects his own uncertainty about the proper organization of the Executive. However, the notes of two other delegates, Rufus King and William Pierce, both of whom are generally reliable, show Madison favoring the idea of a single executive conjoined with a privy council. King depicts himself as proposing a much longer term than Wilson—either seven years with no eligibility for re-election, or an

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113 *Id.* at 68 (June 1).

114 *Id.*

115 In general, Wilson tended to favor frequent elections and few restrictions on eligibility to office, so as to give the people the opportunity to make their choices as freely and as frequently as reasonably possible.

116 *Id.* at 69 (June 1).

appointment during good behavior (which would have virtually turned the Executive into an elected monarch).<sup>117</sup>

On Saturday, June 2, Wilson again seized the initiative and opened the day's proceedings with a new proposal for the election of the Executive. He would, he said, have preferred a direct election by the people, but as an alternative proposed an indirect election whereby the people would select special electors who would then choose the Executive. This device, in Wilson's eyes, would at least have the advantage of keeping the election of the President out of the hands of both the states and the national legislature. We see here an important aspect of Wilson's general strategy at the Convention. He quickly saw that his preferred solution—direct election of the Executive by the people—was politically unattainable. So instead he proposed an indirect alternative that came as close as he could manage to his preferred outcome and that would at least avoid the perils of making the Executive dependent for its authority either on the national legislature or on the legislatures of the states. The Convention nevertheless (for now) rejected his idea of an indirect popular election, and the delegates decided instead that the Executive should be elected by the national legislature for a term of seven years.<sup>118</sup>

Wilson was now called upon to perform a duty he performed throughout the summer. The elderly Benjamin Franklin attended most of the sessions, but he did not feel capable of speaking in public. He therefore would write out his remarks in advance and have them read to the other delegates by his Pennsylvania colleague, James Wilson, who on this occasion read Franklin's suggestion that the executive magistrate should receive no salary.<sup>119</sup>

Next John Dickinson proposed that the Executive should be removable by the national legislature on the request of a majority of the legislatures of the states. Sherman went even further and proposed that the Executive be removable at the pleasure of the national legislature. Madison now joined Wilson in arguing strenuously against Dickinson's proposal, and, in particular, against the suggestion that the states should have any role in the removal of the national Executive. In part, their objection turned on the same consideration that led them to favor proportional representation in the Senate: Dickinson's plan would operate on the principle of one-state-one-vote, and

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<sup>117</sup> *Id.* at 70, 71, 74 (June 1).

<sup>118</sup> *Id.* at 81 (June 2).

<sup>119</sup> Madison noted that the suggestion was treated politely, "rather for the author of it, than from any apparent conviction of its expediency or practicability." *Id.* at 85.

would thus allow a minority of the people to defeat the will of the majority.<sup>120</sup>

The following Monday, June 4, Wilson opened with a long speech, arguing for his postponed motion on behalf of a single Executive and contending that an Executive composed of three co-equal persons, as Randolph had proposed, would be a recipe for internal confusion and disagreement. He also firmly rejected the idea of an executive council. On these matters the delegates sided with Wilson, and they agreed 7-3 to a single Executive.<sup>121</sup>

They next took up the question of the Executive veto. Wilson and Hamilton proposed to give the Executive and Judiciary, acting jointly, an *absolute* veto over national legislation. Franklin and Sherman both opposed such a veto; Madison proposed, as a compromise, allowing the legislature to override the veto by a supermajority. Mason and Franklin both expressed their fear that the concentration of power in a single Executive would end in monarchy, and the delegates voted 10-0 to reject the motion for an absolute Executive veto. They instead decided, at least provisionally, to allow two-thirds of each branch of the legislature to override a veto wielded by the Executive alone.

It appears likely, although the speech is not recorded in Madison's own *Notes*, that Madison at this point gave a speech arguing that the Judiciary ought to be involved in the making of the laws and that the veto power therefore ought to be shared in by the national Judiciary.<sup>122</sup> Wilson, seconded by Madison, then formally moved that "a convenient number of the National Judiciary" share in the veto power, but a vote on this motion was postponed.<sup>123</sup>

The Convention had now spent three days discussing the nature of the Executive. Wilson had argued vigorously for a single Executive, governing without a privy council, elected not by the states or by the national legislature, but indirectly by the people, holding office

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120 In reply, Dickinson mentioned, almost in passing, his hope that one branch of the legislature would be organized on the principle of equal state voting and the other branch on proportional representation. This idea was of course ultimately to become the basis for the "Great Compromise," but at the time its significance seems to have gone unremarked. *Id.* at 87 (June 2).

121 *Id.* at 97 (June 4).

122 The notes of both Rufus King and William Pierce mention that Madison gave "a very able and ingenious Speech" at this point in the proceedings, *id.* at 108, 110 (June 4), although there is some doubt about the dating of Madison's argument. In any case, Madison's *Notes* at the end of this day's proceedings are clearly defective, a fact that is compatible with his having delivered a major speech that afternoon.

123 *Id.* at 104.

for a short term, capable of re-election, and wielding a veto power. By the end of the first full week he had sketched the principal constitutional features of what was to become the American presidency. He was the first delegate to advocate many of these features, and he was to be their most vigorous and articulate champion throughout the summer. More importantly, he had sketched a conception of American government in which *both* houses of the national legislature and also the national Executive would derive their authority, not from some other branch of government, but directly from an election by the people. He was also the only delegate in the opening weeks to advocate the direct popular election of the President. His views, even on the presidency, did not gain immediate acceptance. At the end of the three days, the Convention had rejected many of his ideas and had tentatively agreed only to a single Executive, elected by the national legislature for a seven-year term, and not re-electable. Wilson was to argue his position throughout the summer, almost to the end of the Convention, before persuading his colleagues to his point of view. It is important to observe that one of the colleagues who needed to be persuaded was James Madison. Madison, as we have seen, had come to the Convention without a very clear idea of the Executive. In the course of these initial debates, although he and Wilson often expressed their support for one another, he did not immediately embrace Wilson's conception of the presidency. Madison's *Notes* are somewhat sketchy on what he himself said during these three days, a fact which may reflect his own uncertainties and hesitations, but it is clear that over the course of the Convention he was following Wilson on these matters rather than the other way around.

### *The Judiciary*

On Tuesday, June 5, the Convention changed direction and took up Clause 9 of the Virginia Plan, which dealt with the national judiciary.<sup>124</sup> Clause 9 had provided for national judges to be appointed by the legislature. Wilson opened by arguing that the legislature would be led into intrigues and that the power of judicial appointment was better placed in the hands of a single, responsible person who could be held accountable. He therefore argued that this power should be

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<sup>124</sup> In general, the Convention spent far more time discussing the legislature and the Executive than the judiciary, and many centrally important issues, such as the power of judicial review, were left to be worked out afterwards.

lodged in the Executive.<sup>125</sup> His suggestion elicited the predictable charge that the presidency was tending dangerously toward a monarchy. Madison agreed with Wilson that a large legislature was not well suited to the election of judges, and he added that the skills of legislators are not well suited to the evaluation of judicial candidates. But he also disliked placing the power solely in the hands of the Executive:

He rather inclined to give it to the Senatorial branch, as numerous eno[ugh] to be confided in—as not so numerous as to be governed by the motives of the other branch; and as being sufficiently stable and independent to follow their deliberate judgments. He hinted this only and moved that the *appointment by the Legislature* might be struck out, & and a blank left to be hereafter filled on maturer reflection.<sup>126</sup>

We shall come later to the reasons why Madison might merely have “hinted” at this solution. Wilson seconded his motion, which easily carried, and the matter was postponed.

The remainder of Clause 9 was also postponed. Several of the remaining minor clauses in the Virginia Plan—dealing, for example, with the admission of new states, or the continuation of the existing Congress—were either rapidly agreed to or postponed. The most significant discussion concerned the mode of ratifying the new Constitution. Various delegates, including Roger Sherman and Elbridge Gerry, favored ratification by the existing Convention Congress and then by the legislatures of the States. Madison declared that, in his opinion, popular ratification was essential to the entire plan; that if the new Constitution were allowed to rest on the authority of the state legislatures, it would be viewed as a mere treaty among the governments of independent states; and that the breach of any part of the Constitution by any state would absolve the others from their obligations. Wilson supported Madison, adding some pointed remarks about majority rule, with obvious implications for the upcoming argument about proportional representation that everybody could see looming on the horizon:

Mr. Wilson took this occasion to lead the Committee by a train of observations to the idea of not suffering a disposition in the plurality of States to confederate anew on better principles, to be defeated by the inconsiderate or selfish opposition of a few (States). He hoped the provision for ratifying would be put on such a footing as to admit of such a partial union, with a door open for the accession of the rest.<sup>127</sup>

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<sup>125</sup> 1 CONVENTION RECORDS, *supra* note 24, at 119 (June 5).

<sup>126</sup> *Id.* at 120 (June 5) (footnote omitted).

<sup>127</sup> *Id.* at 123 (June 5).

Madison at this point in his *Notes* added a footnote: "This hint was probably meant in terrorem to the smaller States of N[ew] Jersey & Delaware. Nothing was said in reply to it."<sup>128</sup>

The Convention postponed decision on the mode of ratification, and instead returned to a consideration of the judicial branch. John Rutledge of South Carolina, supported by Roger Sherman, moved that the clause in the Virginia Plan providing for the creation of lower national courts be struck out. They argued that a single Supreme Court would be adequate to secure uniformity, and all other judicial business could and should be handled by state tribunals. Madison replied that, without lower national courts, the Supreme Court would be overwhelmed by appeals, and, moreover, without national trial courts there would be no obvious remedy for a trial before a prejudiced local jury. Wilson strongly supported Madison, arguing as well that admiralty cases should lie entirely within the jurisdiction of the national courts. Despite the advocacy of Madison and Wilson, the delegates voted 5-4-2 not to establish lower national courts in the Constitution.<sup>129</sup> Wilson and Madison responded to this vote by proposing—following an earlier suggestion by John Dickinson—that the national legislature should at least be given the *discretion* to create inferior courts. This proposition, often called the "Madisonian compromise" in the scholarly literature on the federal courts, was agreed to as the last measure of the day, thereby enabling the eventual creation by Congress of the system of lower federal courts.<sup>130</sup>

### *The Legislature Revisited*

On Wednesday, June 6, the Convention once again took up the issue of the election of the national legislature. It had earlier been agreed (on May 31) that the lower branch should be elected by the people, but now Charles Pinckney and John Rutledge of South Carolina moved that the lower branch be elected by the legislatures of the States. Elbridge Gerry of Massachusetts urged a middle position: the people would *nominate* certain persons from whom the state legislatures would then make their selection. Since South Carolina and

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128 *Id.* n.\*. It is unclear from Farrand's printed text whether this footnote was written by Madison at the time of the Convention, or decades afterwards when he revised his notes for publication.

129 *Id.* at 125 (June 5).

130 *Id.* Madison's *Notes* say that "Mr. Wilson & Mr. Madison then moved [the Dickinson suggestion]"; so the "Madisonian compromise" appears to have been suggested by Dickinson, moved by Wilson, and only then seconded by Madison.

Massachusetts were among the states Madison was counting on to support proportional representation in both the upper and the lower house, he must have sensed that serious difficulties lay ahead. He did not immediately speak, but Wilson opposed the motion at length, and further elaborated upon his conception of republican government:

He wished for vigor in the Gov[ernment] but he wished that vigorous authority to flow immediately from the legitimate source of all authority. The Gov[ernment] ought to possess not only 1st. the *force* but 2ndly. the *mind or sense* of the people at large. The Legislature ought to be the most exact transcript of the whole Society. Representation is made necessary only because it is impossible for the people to act collectively. The opposition was to be expected he said from the *Governments*, not from the Citizens of the States. The latter had parted as was observed (by Mr. King) with all the necessary powers; and it was immaterial to them, by whom they were exercised, if well exercised. The State officers were to be losers of power. The people he supposed would be rather more attached to the national Govt. than to the State Govts. as being more important in itself, and more flattering to their pride.<sup>131</sup>

Madison's *Notes* show that Wilson ended his speech with the following observation: "There is no danger of improper elections if made by *large* districts. Bad elections proceed from the smallness of the districts which give an opportunity to bad men to intrigue themselves into office."<sup>132</sup> The observation is remarkable not only because it echoes one of the central themes in Madison's own political thought, but also because later that same day, June 6, Madison was to give what he records in his *Notes* as a long speech setting forth for the delegates his newly-conceived ideas about faction in small republics. Madison's speech ended:

The only remedy is to enlarge the sphere, & thereby divide the community into so great a number of interests & parties, that in the 1st. place a majority will not be likely at the same moment to have a common interest separate from that of the whole or of the minority; and in the 2d. place, that in case they sh[ould] have such an interest, they may not be apt to unite in the pursuit of it.<sup>133</sup>

The other notetakers on June 6 did not record Madison's speech, which in any case seems to have had little impact on the other delegates.<sup>134</sup> But the striking similarity of Wilson's and Madison's remarks suggest that the two delegates had been conversing "out of doors,"

131 *Id.* at 132-33 (June 6).

132 *Id.* at 133.

133 *Id.* at 136 (June 5).

134 The lack of impact of Madison's speech of June 6 is discussed at length by Larry Kramer. See Kramer, *supra* note 45.

and that Madison had explained to Wilson the ideas that were to find their most famous expression in *Federalist No. 10*.

In the course of these arguments, Wilson also made some initial comments about his own conception of federalism:

Mr. Wilson, would not have spoken again, but for what had fallen from Mr. Read; namely, that the idea of preserving the State Gov[ernments] ought to be abandoned. He saw no incompatibility between the national & State Gov[ernments] provided the latter were restrained to certain local purposes; nor any probability of their being devoured by the former. In all confederated systems antient [sic] & modern the reverse had happened; the Generality being destroyed gradually by the usurpations of the parts composing it.<sup>135</sup>

The motion to allow the state legislatures to elect the national legislature was then voted down, 8-3.

Wilson now moved to reconsider the proposal, which had originally come from Madison, to allow "a convenient number of the national Judiciary"<sup>136</sup> to participate with the Executive in the veto power. Madison seconded Wilson's motion and gave a long speech arguing that such a combination was necessary, both to give support to the Executive, and also to allow the judiciary to defend itself against legislative encroachments. Despite the best efforts of Madison and Wilson, the Convention rejected this proposal, 8-3.<sup>137</sup>

The next day, Thursday, June 7, the delegates returned to a highly sensitive issue: the election of the Senate. One week earlier the Convention had rejected the Virginia Plan's proposal that the first branch of the national legislature elect the Senate from names provided by the state legislatures, but they had not replaced it with any new method.<sup>138</sup> John Dickinson now moved that the members of the Senate be chosen by the legislatures of the states. The idea was to secure a Senate composed of "wealth, family, or Talents."<sup>139</sup> Dickinson favored a large Senate: "by [e]nlarging their numbers you increase their consequence & weight & by combining the families and wealth of the aristocracy, you establish a balance that will check the Democracy . . ."<sup>140</sup> Wilson argued against his old mentor that such a Senate would be too large, and, moreover, would be beholden to the states.

<sup>135</sup> 1 CONVENTION RECORDS, *supra* note 24, at 137 (June 6).

<sup>136</sup> *Id.* at 138 (June 6).

<sup>137</sup> *Id.* at 138-40 (June 6).

<sup>138</sup> See *supra* notes 95-96 and accompanying text.

<sup>139</sup> 1 CONVENTION RECORDS, *supra* note 24, at 158 (June 7).

<sup>140</sup> *Id.* Dickinson's remarks are here reported by Rufus King rather than by Madison.



Instead—and consistently with his general approach—he proposed a direct election of the Senate by the people:

If we are to establish a national Government, that Government ought to flow from the people at large. If one branch of it should be chosen by the Legislatures, and the other by the people, the two branches will rest on different foundations, and dissensions will naturally arise between them. He wished the Senate to be elected by the people as well as the other branch, and the people might be divided into proper districts for the purpose & moved to postpone the motion of Mr. Dickenson [sic], in order to take up one of that import.<sup>141</sup>

Madison pointed out that Dickinson's proposal ran into a mathematical problem: it would be necessary *either* to abandon the principle of proportional representation *or* to make the Senate excessively large. The Senate, he said, is supposed to act with greater coolness and more wisdom than the popular branch, and these traits are incompatible with a large body.<sup>142</sup>

Dickinson rejected Madison's argument, and, moreover, accused Wilson of wishing to extinguish the states, which, in a complicated metaphor, he compared to the planets of the solar system. Wilson replied:

The subject it must be owned is surrounded with doubts and difficulties. But we must surmount them. The British Governm[ent] cannot be our model. We have no materials for a similar one. Our manners, our laws, the abolition of entails and of primogeniture, the whole genius of the people, are opposed to it. He did not see the danger of the States being devoured by the Nation[al] Gov[ernment]. On the contrary, he wished to keep them from devouring the national Gov[ernment]. He was not however for extinguishing these planets as was supposed by Mr. D[ickinson]—neither did he on the other hand, believe that they would warm or enlighten the Sun. Within their proper orbits they must still be suffered to act for subordinate purposes (for which their existence is made essential by the great extent of our Country.) He could not comprehend in what manner the landed interest w[ould] be rendered less predominant in the Senate, by an election through the medium of the Legislatures than by the people themselves. If the Legislatures, as was now complained, sacrificed the commercial to the landed interest, what reason was there to expect such a choice from them as would defeat their

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<sup>141</sup> *Id.* at 151 (June 7). Notice that Wilson's proposal says nothing about the *size* of the electoral districts, nor about their relation to the states. It would be compatible with his suggestion to unite two small states into a single senatorial district or to split a large state into several districts. His proposal concerns the means of electing the Senate but does not say anything about how many senators each state is to have.

<sup>142</sup> According to the records of Rufus King, Madison in this speech also remarked that "the Senate ought to come from and represent the Wealth of the nation . . ." *Id.* at 158 (June 7). This remark is consistent with Madison's general views, but does not appear in his own notes of the speech.

own views. He was for an election by the people in large districts which w[ould] be most likely to obtain men of intelligence & uprightness; subdividing the districts only for the accommodation of voters.<sup>143</sup>

Madison spoke immediately after Wilson, more to denounce Dickinson's plan for an election by the state legislatures than to endorse Wilson's plan for an election by the people. When the matter came to a vote, Wilson's plan was rejected, 10-1. Despite the lengthy arguments of Wilson and of Madison, Dickinson's was adopted, 10-0.

On Friday, June 8, the Convention spent almost the entire day discussing Madison's idea that the national legislature should possess a negative on all laws passed by the state legislatures. Madison spoke at length on behalf of the motion, arguing that such a power was "absolutely necessary."<sup>144</sup> The only alternative mechanism for compelling the states to obey the national authority was the use of force; but "[t]he negative w[ould] render the use of force unnecessary."<sup>145</sup> In order to be effective, it must extend to all cases; "[t]his prerogative of the General Gov[ernment] is the great pervading principle that must controul [sic] the centrifugal tendency of the States; which, without it, will continually fly out of their proper orbits and destroy the order & harmony of the political system."<sup>146</sup>

Madison's speech, not surprisingly, drew a skeptical response from several of the delegates, especially from the smaller states. Wilson, however, spoke at length in defense of the proposal—both of the veto power and of its extension to all cases. (This is one of the places where one most suspects an explicit alliance between Wilson and Madison. The idea of a "national negative" was one that Madison cherished, but that otherwise had little support in the Convention; and there is no particular reason to think that Wilson would have come up with it on his own, or that he would have supported it had he not been working so closely with Madison.) In this speech he drew an analogy between the situation of the sovereign states and that of an individual in the state of nature:

Mr. Wilson would not say what modifications of the proposed power might be practicable or expedient. But however novel it might appear the principle of it when viewed with a close & steady eye, is right. There is no instance in which the laws say that the individuals sh[ould] be bound in one case, & at liberty to judge whether he will obey or disobey

143 *Id.* at 153–54 (June 7). The words in parentheses were most likely inserted by Madison when he revised his manuscript in the 1820s.

144 *Id.* at 164 (June 8).

145 *Id.* at 165 (June 8).

146 *Id.* at 164 (June 8).

in another. The cases are parallel, Abuses of the power over the individual person may happen as well as over the individual States. Federal liberty is to States, what civil liberty, is to private individuals. And States are not more unwilling to purchase it, by the necessary concession of their political sovereignty, that the savage is to purchase Civil liberty by the surrender of the personal sovereignty[,] which he enjoys in a State of nature.<sup>147</sup>

He then turned to an analysis of the history of the American states since the Revolution:

Among the first sentiments expressed in the first Cong[ress] one was that Virg[inia] is no more. That Mass[achusetts] is no [more], that P[ennsylvania] is no more, &c. We are now one nation of brethren. We must bury all local interests & distinctions. This language continued for some time. The tables at length began to turn. No sooner were the State Gov[ernments] formed than their jealousy & ambition began to display themselves. Each endeavored to cut a slice from the common loaf, to add its own morsel, till at length the confederation became frittered down to the impotent condition in which it now stands. Review the progress of the articles of Confederation thro[ugh] Congress & compare the first & last draught of it. To correct its vices is the business of this convention. One of its vices is the want of an effectual controul in the whole over its parts. What danger is there that the whole will unnecessarily sacrifice a part? But reverse the case, and leave the whole at the mercy of each part, and will not the general interest be continually sacrificed to local interests?<sup>148</sup>

In response to these speeches by Madison and Wilson, Gunning Bedford of Delaware now forcefully raised the central issue. The proposed negative, he said, was intended "to strip the small States of their equal right of suffrage."<sup>149</sup> He expressed his fear that the large states would "crush the small ones whenever they stand in the way of

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<sup>147</sup> *Id.* at 166 (June 8). He would go on to explore this analogy between sovereign states and individuals in much greater detail in his *Lectures on Law* in the early 1790s, especially in Lecture VIII ("On Man, as a Member of a Confederation," reprinted in I THE WORKS OF JAMES WILSON, *supra* note 3, at 247.) I note that the argument he gives here is (as he must have recognized) exceptionally weak: it does not follow from a principle of federal sovereignty that the national legislature must have an *absolute* veto over *all* laws passed by the legislature of the states. Since he himself, in his service on the Committee of Detail, was, with Rutledge, the principal architect of the Constitution's system apportioning powers between the federal and the state governments, and since he repeatedly in his theoretical writings emphasized that the People, as Sovereign, could apportion these powers as they saw fit, I conclude that he was here doing his best to support Madison, but without fully believing his own argument.

<sup>148</sup> *Id.* at 166–67 (fourth alteration in original). Rufus King's notes render this passage as follows: "We must remember the language with wh[ich] we began the Revolution, it was this, Virginia is no more, Massachusetts is no more—we are one in name, let us be one in Truth & Fact . . ." *Id.* at 172 (June 8).

<sup>149</sup> *Id.* at 167 (June 8).

their ambitions,”<sup>150</sup> and he did not hesitate to aim his criticisms at Wilson and Madison personally: “It seems as if P[ennsylvania] & V[irginia] by the conduct of their deputies wished to provide a system in which they would have an enormous & monstrous influence.”<sup>151</sup> This was the first sign of personal rancor over the issue that divided the small states from the large, and Madison and Wilson were explicitly lumped together as the ringleaders. More such language was to follow in the coming weeks.

Madison replied by acknowledging that there were practical difficulties with the exercise of the negative, in particular because the more numerous branch of the national legislature was not expected to be in continuous session. He suggested—and it is an important suggestion—“that the negative might be very properly lodged in the senate alone.”<sup>152</sup> Then, as he had hinted in his letters before the Convention, he began to make his own *in terrorem* threats against the smaller states:

He asked Mr. B[edford] what would be the consequence to the small States of a dissolution of the Union w[hich] seemed likely to happen if no effectual substitute was made for the defective System existing, and he did not conceive any effectual system could be substituted on any other basis than that of a proportional suffrage? If the large States possessed the Avarice & ambition with which they were charged, would the small ones in their neighbourhood, be more secure when all controul[sic] of a Gen[eral] Gov[ernment] was withdrawn[?]<sup>153</sup>

But Madison’s speech was to no avail, and the vote at the end of the day must have seemed ominous. His proposed negative, which he regarded as an essential element of his plan, was soundly defeated, 7-3-I. Only the three large states (Virginia, Pennsylvania, and Massachusetts) had voted in favor; two members even of Madison’s own delegation (Randolph and Mason) had voted against; Delaware split evenly; and every other state was solidly opposed.

Saturday, June 9, brought the second week’s proceedings to a close and gave a hint of the controversies that were soon to follow. The Convention first soundly rejected a proposal by Elbridge Gerry that the President be appointed by the governors of the states. It then returned to the contentious issue of the rule of voting in the national legislature. The small states up to this point seem to have been intimidated in particular by the phalanx of Madison and Wilson, but

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150 *Id.*

151 *Id.*

152 *Id.* at 168 (June 8).

153 *Id.*

now David Brearly and William Paterson, both of New Jersey, gave long speeches defending the principle of one-state-one-vote. They expressed their fear that the three large states would constantly overpower the ten small ones; that the small states would lose their sovereignty; that the proposed rule was unfair; and that "there was no more reason that a great individual State contributing much, should have more votes than a small one contributing little, than that a rich individual citizen should have more votes than an indigent one."<sup>154</sup> Paterson then directly responded to Wilson's "*in terrorem*" threat of the previous Tuesday:

He alluded to the hint thrown out heretofore by Mr. Wilson of the necessity to which the large States might be reduced of confederating among themselves, by a refusal of the others to concur. Let them unite if they please, but let them remember that they have no authority to compel the others to unite. N[ew] Jersey will never confederate on the plan before the Committee. She would be swallowed up. He had rather submit to a monarch, to a despot, than to such a fate. He would not only oppose the plan here but on his return home do everything in his power to defeat it there.<sup>155</sup>

Madison did not speak on this day as his strategy came unglued, and it was left to Wilson to end the week's proceedings. He began with a declaration of a central principle, perhaps the central principle, of his constitutional theory:

[Mr. Wilson] entered elaborately into the defence of a proportional representation, stating for his first position that as all authority was derived from the people, equal numbers of people ought to have an equal n[umber] of representatives, and different numbers of people different numbers of representatives.<sup>156</sup>

With this statement, Wilson became the only member of the Convention to endorse unequivocally the principle of one-person-one-vote. The other Framers—including, as we shall see, Madison—favored the principle for the election of "the democratic branch" of the legislature, but sought to limit its radical implications elsewhere. In Wilson's speeches of Friday and Saturday we can begin to see the outline of a sophisticated view that sought to combine three elements: (1) a preservation of the State governments; (2) the principle that political authority flows ultimately, not from the States, but from the American people taken as a whole; and (3) a radical commitment to the principle of one-person-one-vote. How exactly these elements were to be

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<sup>154</sup> *Id.* at 176–79 (June 9).

<sup>155</sup> *Id.* at 179.

<sup>156</sup> *Id.* It would of course have been understood at the time that "people" in Wilson's statement included only men.

combined, and what was their underlying philosophical justification, were questions whose answer was not yet clear, although it is evident that Wilson had given these topics considerable thought. For the moment, Wilson deployed the principle of one-person-one-vote to refute the arguments of Paterson:

This principle had been improperly violated in the Confederation, owing to the urgent circumstances of the time. . . . Mr. P[aterson] admitted persons, not property to be the measure of suffrage. Are not the citizens of Pen[nsylvania] equal to those of N[ew] Jersey? [D]oes it require 150 of the former to balance 50 of the latter? Representatives of different districts ought clearly to hold the same proportion to each other, as their respective constituents hold to each other. If the small States will not confederate on this plan, Pen[nsylvania] & he presumed some other States, would not confederate on any other. We have been told that each State being sovereign, all are equal. So each man is naturally a sovereign over himself, and all men are therefore naturally equal. Can he retain this equality when he becomes a member of civil Government? He can not. As little can a Sovereign State, when it becomes a member of a federal Govern[ment]. If N[ew] J[ersey] will not part with her Sovereignty it is in vain to talk of Gov[ernment]. A new partition of the States is desirable [sic], but evidently & totally impracticable.<sup>157</sup>

The notes of Robert Yates give a more abrupt, and perhaps more accurate, version of a portion of Wilson's speech:

Shall New-Jersey have the same right or influence in the councils of the nation with Pennsylvania? I say no. It is unjust—I never will confederate on this plan. The gentleman from New Jersey is candid in declaring his opinion—I commend him for it—I am equally so. I say again I never will confederate on his principles. If no state will part with any of its sovereignty, it is in vain to talk of a national government.<sup>158</sup>

This rancorous tone foreshadowed the bitter arguments that were to dominate the Convention for the next five weeks, until the "Great Compromise" was reached on July 16. It also brought about one of the strangest episodes of the Convention. On Monday, Benjamin Franklin delivered a speech remarking that, until this subject of proportional representation had arisen,

[O]ur debates were carried on with great coolness & temper. If any thing of a contrary kind, has on this occasion appeared. I hope it will not be repeated; for we are sent here to *consult* not to *contend*, with each other; and declarations of a fixed opinion, and of determined resolution, never to change it, neither enlighten nor convince us.<sup>159</sup>

<sup>157</sup> *Id.* at 179–80 (June 9).

<sup>158</sup> *Id.* at 183 (June 9).

<sup>159</sup> *Id.* at 197 (June 11).

Paterson and Wilson were certainly the primary targets of Franklin's rebuke, perhaps Bedford and Madison as well. Franklin's remarks, as usual, were read out loud to the Convention by Wilson; Madison's *Notes* do not tell us the expression on Wilson's face.

This will be a good place to take stock. So far, we are only at the end of the second week of a Convention that lasted slightly more than fifteen weeks. But, already, several things have become clear about the role of James Wilson during the proceedings. First, almost from the opening day, Wilson and Madison found themselves in a remarkably close alliance. Indeed, these two dominated the proceedings during the opening weeks. They spoke virtually every day; they addressed every major issue, and did so with great vigor, and in detail. On many of these issues, either Madison or Wilson was the primary mover, and, on most, either Madison rose to support the position of Wilson, or Wilson rose to support the position of Madison. The Convention shows no other pairing comparable to this one, and it was to last throughout the summer. Indeed, at three points during the first two weeks, Madison's own *Notes* do not trouble to distinguish his own position from that of Wilson, simply saying "Mr. M(adison) and Mr. Wilson observed"<sup>160</sup> or "Mr. Wilson and Mr. Madison then moved."<sup>161</sup> We do not know the details of their dealings off the Convention floor, but these facts, together with the fact that Wilson on June 6 employed Madison's theory of the extended republic, the fact that they were both in Philadelphia for nearly three weeks before the start of the Convention, and the fact that Madison's strategy explicitly depended upon forming alliances with the large-state delegations, make it reasonable to conclude that they were in close communication throughout the proceedings.

Secondly, however, a close inspection of Madison's *Notes* shows that it is an error to treat Wilson merely as "Madison's ablest supporter."<sup>162</sup> This is not to deny that Wilson provided Madison with argumentative assistance, but neither was a slavish follower of the other. Madison indeed was willing to oppose elements even of the Virginia Plan that he had himself largely designed, calling into question, for example, the provision allowing the national government to use force against the States. He was equally willing to oppose such ideas as Wilson's suggestion that the Executive be furnished with an absolute veto over national legislation. Wilson, for his part, was willing to stake out

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<sup>160</sup> *Id.* at 86.

<sup>161</sup> *Id.* at 125 (June 5).

<sup>162</sup> FARRAND, *supra* note 1, at 198.

a position significantly at variance with that of Madison. This is most clear, as we have seen, in the discussions of the Executive. The Virginia Plan said very little about this topic, and in fact Madison, in his letters written before the Convention, had emphasized how little thought he had given to the entire question. Wilson, in contrast, arrived on the scene with very definite ideas. He favored, as we have seen, a single, re-electable President, holding office for a short-term, wielding a powerful veto, governing without a privy council, and elected, not by the states, nor by the national legislature, but (directly or indirectly) by the people. One might be tempted to call Madison on these issues "Wilson's ablest supporter," except that Madison provided little support, and indeed took a long time to come around to Wilson's view.<sup>163</sup> In other words, sometimes Madison was the dominant partner, and sometimes Wilson; their collaboration was not simply a matter of Wilson's carrying out the instructions of his junior colleague.

These facts, important though they are, are nevertheless relatively superficial. They tell us the *ways* in which Madison's and Wilson's voting patterns converged and differed, but do not trace these relationships to deeper conceptions of the nature of constitutional law and republican governance. The deeper points only begin to emerge when we ask ourselves *why* a constitutional thinker as subtle and careful as Madison paid so little attention to the structure of the executive or judiciary.

To answer this question, we shall need to look more closely at the nature of Madison's thinking during the opening weeks of the Constitutional Convention. Here it is essential not to make a confusion that is widespread in the literature: It is commonplace to identify Madison as the "father of the Constitution"—to look at him as the author of the Virginia Plan, a principal participant during the Convention, its chief notetaker, the author of *The Federalist*, and the chief congressional sponsor of the Bill of Rights—and then to run together all of these separate enterprises without paying attention to the rapidly evolving nature of Madison's thought. More broadly, it is commonplace to identify Madison as the chief architect of the Constitution and then to identify *The Federalist* as the authoritative exposition of Madison's own views, so that *The Federalist* becomes the canonical exposition of the "original intent" of the Framers. Madison's theory of faction in *Federalist No. 10* then becomes the key to understanding

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163 As we shall see, a similar story holds for the design of the national judiciary.



the entire plan of government embodied in the Constitution. But Madison himself, in his subsequent memoirs, strongly emphasized the way in which the views of all the delegates changed over the course of the summer of 1787.<sup>164</sup> If we are to understand the respective roles played by Madison and Wilson, it is important to confine our attention exclusively to Madison's writings before the start of the Convention, and in particular not to read him through the lens of *The Federalist* nor to treat him as a theoretician of three co-equal branches of government. "Publius" was a mask, and his arguments were an exercise in public propaganda, intended not to present the views of Madison or Hamilton, but to persuade the voters of New York to ratify the completed Constitution. But we know from Madison's correspondence with Jefferson that he privately continued to harbor great doubts about the Constitution, and that he was disappointed by what, even months afterward, he regarded as his failure at the Convention.<sup>165</sup>

If we look closely at the Virginia Plan, at Madison's remarks in the opening weeks of the Convention, his earlier letters to Jefferson, Randolph, and Washington, and at his various diagnoses of the vices of the Articles of Confederation, the following points emerge:

1. Madison, as he repeatedly said, entered the Convention with extremely sketchy views of the nature of the executive branch. The Virginia Plan says little more than (a) a national Executive should exist; (b) it should have a veto power; and (c) it should be elected by the national legislature. Everything else was left unspecified.<sup>166</sup>

2. His views of the national judiciary were only somewhat more fully developed. The Virginia Plan held that a national judiciary should exist; that there should be lower national courts; and that the courts should have the power to hear maritime cases and disputes between citizens of different states. But it said nothing of the power of judicial review; the power of the national courts to adjudicate disputes between two or more States; nor of the power of the national

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164 As Madison wrote years later, probably in the 1820s, there were "[f]ew who did not change in the progress of discussions the opinions on important points which they carried into the Convention [and] . . . [f]ew who, at the close of the Convention, were not ready to admit this change as the enlightening effect of the discussions . . . ." 3 CONVENTION RECORDS, *supra* note 24, at 455.

165 See *supra* note 43 and accompanying text.

166 1 CONVENTION RECORDS, *supra* note 24, at 21 (May 29).

courts to adjudicate disputes that arose under national legislation, or, indeed, under the proposed Constitution itself.<sup>167</sup>

3. Madison had thought most carefully and most deeply about the structure and the powers of the national legislature. One of his central ideas was given early in the Convention:

Mr. Madison considered the popular election of one branch of the national Legislature as essential to every plan of free Government. . . . He was an advocate for the policy of refining the popular appointments by successive filtrations, but thought it might be pushed too far. He wished the expedient to be resorted to only in the appointment of the second branch of the Legislature, and in the Executive & judiciary branches of the Government.<sup>168</sup>

Madison was, of course, a strong proponent of bicameralism, and he never wavered on the principle that the first branch should be popularly elected. While he never went quite as far as Wilson, and never endorsed a principle of one-person-one-vote, in practice his views and those of Wilson on the election of the lower branch coincided.

4. It is when we turn to the second branch—to the nature and composition of the Senate—that real differences begin to emerge. Wilson, as we have seen, favored a bicameral legislature in which the Senate, although smaller than the first branch, would also be directly elected by the people on the principle of one-person-one-vote. This position entailed, as a consequence, the principle of proportional representation in both branches of the legislature. Although both Wilson and Madison argued strenuously for proportional representation in the Senate, it is important to see that their arguments were grounded in different underlying principles and in a very different conception of the powers and role of the Senate. Madison, in particular, never endorsed the general principle of one-person-one-vote. Nor did he wish the Senate to be directly elected by the people. Instead, he favored the policy of a “filtration”: the Senate was to be elected by the first branch, freeing it from direct dependency both on the people and on the states.

5. For Madison, the Senate was always to be what—even after the Convention, in a letter to Jefferson—he called the “great anchor” of

167 *Id.* at 21–22. On all these matters, ignored by Madison before the Convention, Wilson’s experience litigating the Connecticut land claims and the Olmstead dispute had given him pronounced views, which he was to articulate later in the proceedings.

168 1 CONVENTION RECORDS, *supra* note 24, at 49–50 (May 29).

the entire system of government.<sup>169</sup> It was meant to provide stability, wisdom, and cool judgment—a check on the excesses of popular democracy.<sup>170</sup> And, although Madison did not emphasize the point in his own *Notes*, the Senate was supposed to represent the interests of private property held by “the opulent Minority.”<sup>171</sup> The core of his view he expressed in private correspondence, even in 1788, after the Constitution had been ratified:

The first question arising here is how far property ought to be made a qualification. There is a middle way to be taken which corresponds at once with the Theory of free government and the lessons of experience. A freehold or equivalent of a certain value may be annexed to the right of vot[ing] for Senators, & the right left more at large in the election of the other House. . . . This middle mode reconciles and secures the two cardinal objects of Government, the rights of persons, and the rights of property. The former will be sufficiently guarded by one branch, the latter more particularly by the other. Give all power to property; and the indigent [will] be oppressed. Give it to the latter and the effect may be transposed. Give a defensive share to each and each will be secure.<sup>172</sup>

In Madison's scheme, the indirect election of the Senate, its small number, and its long term of office were all intended to secure the necessary wisdom and stability and safeguard the rights of private property.

6. The powers Madison would have lodged in the Senate were broad, and they included many which we think of as inherently executive. At the federal level, the Senate, as well as engaging in all the

169 Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 3 CONVENTION RECORDS, *supra* note 24, at 133.

170 This is a recurring theme in the speeches of Madison (and of many other delegates). See, e.g., 1 CONVENTION RECORDS, *supra* note 24, at 222 (June 12) (considering the Senate “a check on the democracy”).

171 SUPPLEMENT, *supra* note 60, at 119 (June 26). Rufus King records Madison as saying on June 7 that “the Senate ought to come from, & represent, the Wealth of the nation . . . .” 1 CONVENTION RECORDS, *supra* note 24, at 158. For the Senate as a collection of “enlightened citizens” who would “interpose ag[ainst] impetuous counsels,” see his extensive remarks on June 26, *id.* at 421–23.

172 This quotation occurs in Madison's October, 1788 letter to John Brown, commenting on Jefferson's 1783 draft for a Constitution for Virginia. 11 THE PAPERS OF JAMES MADISON 285–93 (Robert A. Rutland et. al. eds, 1979). In his letter of August 23, 1785 to Caleb Wallace, Madison had written: “*The Legislative department* ought by all means, as I think to include a Senate constituted on such principles as will give *wisdom* and steadiness to legislation. The want of these qualities is the grievance complained of in all our republics. The want of fidelity in the administration of power having been the grievance felt under most Governments, and by the American States themselves under the British Government. . . . The Senate of Maryland with a few amendments is a good model. . . . [A worse Senate than that of Virginia] could hardly have been substituted & yet bad as it is, it is often a useful bitt in the mouth of the house of Delegates.” 8 THE PAPERS OF JAMES MADISON 350–51 (Robert A. Rutland et. al. eds, 1973).

ordinary business of legislation, would have conducted negotiations with foreign governments,<sup>173</sup> appointed ambassadors,<sup>174</sup> shared in the election of the Executive,<sup>175</sup> and appointed officers of the national government, including the judiciary.<sup>176</sup>

7. But to understand the full thrust of Madison's thinking, we need to consider another central element of the Virginia Plan. Madison's central preoccupation throughout the months leading up to the Convention was not just with the structural weakness of the Convention Congress, and not just with the rivalries between the states, but also with the significant problems internal to the state governments themselves. It seemed that majorities were everywhere willing to employ democratic political power to crush individual rights—not just property rights, but also rights of religious freedom, of criminal defendants, and of freedom of the press—and to ride roughshod over minority interests. The famous theory of faction—given its canonical expression in *Federalist No. 10*, but sketched by Madison in the Convention speeches, and in his earlier correspondence—was in part intended to address this problem. The problem of faction, Madison argued, was likely to be worse in small republics than in large. In large republics, there would be such a vast number of different interests and different political groupings that stable oppressive majority coalitions would be difficult to form.

This famous theory of faction, however, played almost no role in the Convention itself, nor was it the centerpiece of Madison's thought at the time. Indeed, taken by itself, it amounts to little more

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173 Wilson (without directly expressing his own opinion) observed early in the proceedings that the power to conduct foreign affairs—and specifically the powers relating to war and treaties—would most likely be lodged by the Convention in the Senate. 1 CONVENTION RECORDS, *supra* note 24, at 426 (June 26). Madison later in the summer, after the collapse of his plan for proportional representation in the Senate, observed that, *because* “the Senate represented the States alone . . . it was proper that the President should be an agent in Treaties.” 2 CONVENTION RECORDS, *supra* note 24, at 392. In other words, as a result of the defeat of July 16, Madison was now migrating to a position close to Wilson's, who had consistently favored lodging these powers in the President.

174 This power was not explicitly mentioned in the Virginia Plan, though in view of Madison's enthusiasm for the Senatorial appointment of judges as expressed on June 13 (1 CONVENTION RECORDS, *supra* note 24, at 232–33) it is more than likely that he would have sought to give this power to the Senate as well. The power to appoint ambassadors was in fact given to the Senate in the Report of the Committee of Detail. 2 CONVENTION RECORDS, *supra* note 24, at 183. Wilson on August 23 expressed his opposition to the lodging of the appointment power in the Senate; the issue was recommitted and eventually voted down by the Convention. *Id.* at 389.

175 This was a core element of the Virginia Plan. See 1 CONVENTION RECORDS, *supra* note 24, at 21 (May 29).

176 *Id.* at 120 (June 5), 232–33 (June 13).

than the expression of a hope that by enlarging the sphere of republican government the problems of the states would somehow disappear. But Madison had a more specific, more plausible, structural proposal in view: the absolute negative by the national legislature on all the laws of the States, "*in all cases whatsoever*."<sup>177</sup> Madison repeatedly, both before and after the Convention, emphasized the centrality of this power to his entire enterprise. He explained it in great detail in a letter to Jefferson after the close of the Convention,<sup>178</sup> and its omission from the Constitution was his principal and most profound ground of dissatisfaction with the completed document.<sup>179</sup> The national negative was the *specific* remedy he proposed for the "vices" of the state governments. The (properly filtered) national government, he hoped, would use this power to strike down the unjust and inequitable laws passed by the narrow-minded state legislatures.

8. We can now see the significance of Madison's repeated suggestions that this national negative be lodged, not in the national legislature as a whole, but more particularly in the Senate. His fellow Virginia delegates appear to have disagreed with him on this point and to have wished to place the power in the legislature, but Madison's own view appears to have been that it would be better lodged in the Senate. Madison was here combining three distinct ideas: first, the theory that the influence of faction would tend to diminish as the sphere of the Republic was enlarged; second, the idea of a "filtration"—that is, the idea that a wise, temperate, stable, and nationally minded Senate could be reliably culled by the first branch from the population of the United States; and third, the idea that this Senate should have the absolute power of striking down state legislation, thereby remedying the corruptions of local government. Madison, in fact, explicitly connected these ideas in his diagnosis of the *Vices of the Political System of the United States*, which he wrote in the weeks leading up to the Convention:

A still more fatal if not more frequent cause lies among the people themselves. All civilized societies are divided into different interests and factions, as they happen to be creditors or debtors—rich or poor—husbandmen, merchants or manufacturers—members of different religious sects—followers of different political leaders—inhabitants of different districts—owners of different kinds of property &c. &c. In republican Government the majority however composed, ultimately give the

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177 Letter from James Madison to George Washington (Apr. 16, 1787), in 9 THE PAPERS OF JAMES MADISON, *supra* note 46, at 383.

178 10 THE PAPERS OF JAMES MADISON, *supra* note 43, at 205–20 (letter to Thomas Jefferson).

179 For the fullest analysis of this issue, see Hobson, *supra* note 44.

law. Whenever therefore an apparent interest or common passion unites a majority what is to restrain them from unjust violations of the rights and interests of the minority, or of individuals?<sup>180</sup>

Madison considers and rejects three answers: prudent self-interest; respect for the reputation of the state; and religion. He concludes:

The great desideratum in Government is such a modification of the Sovereignty as will render it sufficiently neutral between the different interests and factions, to controul [sic] one part of the Society from invading the rights of another, and at the same time sufficiently controuled [sic] itself, from setting up an interest adverse to that of the whole Society. In absolute Monarchies, the prince is sufficiently, neutral towards his subjects, but frequently sacrifices their happiness to his ambition or his avarice. In small Republics, the sovereign will is sufficiently controuled [sic] from such a Sacrifice of the entire Society, but is not sufficiently neutral towards the parts composing it. As a limited Monarchy tempers the evils of an absolute one; so an extensive Republic meliorates the administration of a small Republic.

An auxiliary desideratum for the melioration of the Republican form is such a process of elections as will most certainly extract from the mass of the Society the purest and noblest characters which it contains; such as will at once feel most strongly the proper motives to pursue the end of their appointment, and be most capable to devise the proper means of attaining it.<sup>181</sup>

It is usual to speak of the Virginia Plan as “the large-state plan,” and to contrast it with the “small-state plan” proposed by the delegates from New Jersey. But it would be more accurate to refer to Madison’s own views as “The Senatorial Plan,” for, as he realized, the Senate was at the heart of his entire conception of constitutional government. He was hoping to give it vast powers, and this is likely the reason why on June 5 he says he only “hinted” at the possibility of allowing the Senate to appoint the national judiciary.<sup>182</sup>

180 Madison, *supra* note 93, at 355–57 (footnote omitted).

181 *Id.* Hamilton, incidentally, was perhaps the only delegate other than Wilson explicitly to notice Madison’s theory as presented on June 6. Hamilton summarized the theory:

Two principles upon which republics ought to be constructed—

I that they have such an extent as to render combinations on the ground of interest difficult—

II By a process of election calculated to refine the representation of the People—

Answer—There is truth in both these principles but they do not conclude so strongly as he supposes—

—The Assembly when chosen will meet in one room if they are drawn from half the globe—& will be liable to all the passions of popular assemblies.

1 CONVENTION RECORDS, *supra* note 24, at I46.

182 See *supra* note I26 and accompanying text.

If this analysis is correct, it helps to explain why Madison paid so little attention to the composition and functions of the national Executive and Judiciary. They were to be auxiliary parts of the new system, whereas the solution to the *deep* problems of the Articles of Confederation—to the problems that had arisen both between the States and inside them—lay in the proper organization of a new, national Senate armed with an absolute veto over state laws. This is all quite different from Wilson. We are not yet in a position to analyze Wilson's deeper views, but already from Madison's *Notes* of the first two weeks of the Convention we can see that Wilson was operating from very different premises. For him, the central principle is that of one-person-one-vote. He wished the political branches, the Executive and *both* chambers of the national legislature, to be directly elected by the people. To prevent abuses of power, he relied on a principle of dividing and balancing the respective spheres of authority so that the settled popular will can find expression in the actions of the government. He had a strongly procedural conception of the way the system is supposed to function, a strong conception of checks and balances. It is doubtless for this reason that he gave as much thought to the organization of the Executive as to the organization of the legislature. For Wilson, the solution to the problems of the Articles was to be found, not in any single branch of government, but, rather, in achieving the right *balance* between the various agencies; state as well as national, executive and judicial as well as legislative. Therefore, he was forced to pay attention to the system as a whole and could not afford to ignore any of its parts.

It is important to note the different role played by the principle of proportional representation in the Senate in the thought of Wilson and of Madison. For Wilson, the principle of one-state-one-vote had to be abandoned because it was *unjust*, and, in particular, because it conflicted with a fundamental tenet of political equality embodied in the principle that each individual should have an equal voice, an equal vote, in the election of the government. This is a principle from which Wilson never deviated, and on whose consistent application he insisted throughout the proceedings. But Madison did not share this conception of equal voting rights. If it was necessary that the lower chamber of the legislature be chosen so that it represented individuals, the Senatorial chamber could be chosen so that it represented something else: the rights of property, for instance, or, as we shall see, the interests of the Southern states. Madison was even willing to have different classes of voters electing the two chambers; and on June 30 he suggested that, in order to safeguard the interests both

of the slaveholding states and the free states, perhaps one chamber should be represented in proportion to the free inhabitants only, and the other in proportion to all inhabitants, including slaves.<sup>183</sup> But this meant that Wilson's argument for proportional representation in the Senate was not available to Madison; indeed, if it was legitimate for the Senate to represent private accumulations of wealth, or of slaves, then what *moral* objection could he raise to a Senate that represents individual States?

Madison's senatorial conception of national government brought with it two important consequences. First, it drove him to argue for some version of proportional representation in the Senate, *not*, as Wilson did, for reasons of political morality, but rather for a very practical reason. He was proposing to make the Senate the most powerful political agency in the United States: more powerful than the lower chamber of the national legislature, more powerful than the executive or the judiciary, and more powerful than the legislature of any individual state. Indeed, the Senate would be able to overturn, at its pleasure, the laws of the states, and, in particular, to overturn the laws passed by the Virginia legislature. It would have been difficult enough to persuade Virginia to accept an all-powerful national Senate, but a national Senate wielding immense power in which Virginia had the same voting power as Rhode Island and New Hampshire could never be ratified. It was for this reason that Madison argued so tenaciously for proportional representation. Second, if proportional representation could *not* be achieved in Philadelphia—if were not possible for Madison's coalition to overwhelm the objections of the small states—then his entire scheme would collapse. The Senate would have to be entirely redesigned; the absolute negative on state laws would have to be abandoned. This is, in fact, close to what happened. Madison fought ferociously for his scheme until it was defeated in the "Great Compromise" of July 16, and thereafter he was forced to abandon the central elements of his plan. A similar collapse did not occur for Wilson. He continued to press for as much direct, popular sovereignty as he could achieve, and, as we shall see, Madison gradually moved closer to the position Wilson had sketched during the first two weeks of the Convention, especially on the presidency and the national courts.

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183 1 CONVENTION RECORDS, *supra* note 24, at 486.



2. *Act I, Part 2. Monday, June 11 to Monday, July 16*

With this analysis of the proceedings of the first two weeks behind us, we can now turn to a more rapid treatment of the remainder of the Convention. The central ideas of Madison and Wilson have already been laid on the table, and the next weeks were primarily to add refinements. Indeed, the following week added only little to Madison's conception of senatorial rule. He and Randolph argued for a seven-year term for senators as a means to control "Democratic licentiousness" and exercise restraint upon the lower branch of the legislature; Madison further urged that the appointment of federal judges should be lodged, not in the entire legislature, but solely in the Senate.<sup>184</sup>

The next phase of the Convention (still in "Act I") lasted about a month, from June 11 to the climactic vote on the "Connecticut Compromise" of July 16. On June 15, William Paterson of New Jersey presented to the Convention an alternative to the Virginia Plan—variously known as the "New Jersey Plan" or the "Small-State Plan"—which provided for a unicameral national legislature, elected by the legislatures of the states, and voting according to the principle of one-state-one-vote.<sup>185</sup> In all of this, the New Jersey Plan followed the Articles of Confederation, but it also expanded the powers of Congress and added a national executive and judiciary. The Convention had been instructed by Congress merely to amend the Articles, so arguably the New Jersey Plan was within the scope of the instructions in a way that the Virginia Plan, which proposed an entirely new form of government, was not.

The New Jersey Plan itself, introduced on a Friday, scarcely survived a week. It was picked apart first by Wilson on Saturday and then by Madison on Tuesday.<sup>186</sup> After this onslaught it was rejected by the Convention. But the conflict over proportional representation now

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184 1 CONVENTION RECORDS, *supra* note 24, at 218 (June 12), 232–33 (June 13). Wilson did not speak on June 12. If he was present, and if, as the unreliable Yates notes say, Madison did indeed say that he regarded the Senate as a "check on the democracy," one would have expected a comment from Wilson. *Id.* at 222.

185 *Id.* at 242–45 (June 15).

186 On Monday, Hamilton addressed the Convention all day, presenting his own highly national plan, and, according to the unreliable Yates notes, disparaging the New Jersey plan, in comparison with the Virginia Plan, as "*pork still, with a little change of the sauce.*" *Id.* at 301 (June 18). Despite the brilliance of his speech, this was altogether an eccentric performance, and Hamilton's plan was never seriously considered by the Convention; he left the proceedings soon afterwards, returning only to sign the final document.

moved to the forefront, dominating the proceedings and threatening to tear apart the Convention; the argument was not resolved until the "Great Compromise" of July 16. The leading proponents of proportional representation were, in the words of a delegate from Connecticut, "Mr. Wilson [and] the gentleman from Virg[inia]."<sup>187</sup> Opposing them were an assortment of small-state delegates, the most important of whom were Roger Sherman and Oliver Ellsworth of Connecticut and William Paterson of New Jersey.

The story of this phase of the Convention is well known, and we need not linger over it. Intellectually, Madison and Wilson were far superior to their opponents, and during the next four weeks tried to dominate the argument by displays of logic and erudition, pointing out contradictions in their opponents' positions and the injustice of the principle of one-state-one-vote. Paterson, Sherman, and Ellsworth were unable to meet the arguments or match the erudition, but they were also stubbornly unwilling to change their votes. They adamantly refused to budge from their position that they would never accept anything less than equal state voting in at least one chamber of the national legislature. The debates grew increasingly acrimonious, and both Wilson and Madison had several testy exchanges with their opponents as argument after brilliant argument failed to produce a change in the votes. In the end, the small state delegates simply wore down the opposition.

During this month-long controversy, the positions of Madison and Wilson rarely diverged, and then only on peripheral matters.<sup>188</sup> But at times they elaborated upon their respective views. Wilson's most important remarks are the following:

(a) *Legitimacy of the Convention.* The advocates of the New Jersey Plan made the argument, which has often been repeated since, that the entire secret set of proceedings—the effort to write a new Constitution rather than to amend the Articles—was unauthorized by Congress and therefore *ultra vires*. In the course of Wilson's dissection of

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187 *Id.* at 355 (June 21). The remark was made by Samuel Johnson. One could also add Gouverneur Morris as a major proponent of the "large-state view," but he spent much of his time on side issues, and his performance during this time was erratic. He devoted considerable energy to advocating restrictions on the power of future Western states, and also to denouncing the existence of states *tout court*, but without making any serious proposal for eliminating them or "tak[ing] out the teeth of the serpents." *Id.* at 530 (July 5).

188 For example, on June 21, Wilson argued for annual elections for members of the lower house, whereas Madison favored elections every three years; on June 22, Madison took the position that salaries of members of Congress should be fixed in the Constitution, whereas Wilson would have left the matter to be determined by Congress. *Id.* at 361, 373–74.

the New Jersey Plan, he provided perhaps the most succinct justification for the proceedings of the Convention. He characteristically relied upon an implicit appeal to popular sovereignty and the fact that the Constitution would ultimately be ratified by the people rather than by Congress: "With regard to the *power of the Convention*, he conceived himself authorized to *conclude nothing*, but to be at liberty to *propose any thing*. In this particular he felt himself perfectly indifferent to the two plans."<sup>189</sup>

(b) *Elections*. Whenever the question of elections arose, Wilson's natural inclination—again, following from his general principle of popular sovereignty—was to widen the electorate as far as possible. He opposed proposals to restrict the franchise and also proposals to restrict the electors' range of choice. Thus he opposed age qualifications for members of Congress: "Mr. Wilson was ag[ainst] abridging the rights of election in any shape. It was the same thing whether this were done by disqualifying the objects of choice, or the persons chusing [sic]."<sup>190</sup>

(c) *Separation of Powers and Federalism*. Four days after these remarks, on June 26, Madison gave one of his longest speeches on the importance of the Senate. Wilson endorsed Madison's proposal for a nine-year term and, at least implicitly, his view of the Senate as a check on the democratic impulses of the House. This position, at least at first glance, stands somewhat in tension with his advocacy of untrammelled popular election and also with his advocacy of annual elections for the House. However, Wilson's opposition to the radically democratic Pennsylvania Constitution of 1776 was based on its violation of the principle of separation of powers. His remarks in the Constitutional Convention on these matters were brief, but he unambiguously favored a policy of separating and dividing powers. This comes out in two places. First, the New Jersey Plan called for a unicameral Congress; in contrast, "Mr. Wilson, urged the necessity of two branches; observed that if a proper model was not to be found in other Confederacies it was not to be wondered at. The number of

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189 *Id.* at 253 (June 16) (footnote omitted).

190 *Id.* at 375 (June 22). His remarks continued:

The motion tended to damp the efforts of genius, and of laudable ambition. There was no more reason for incapacitating *youth* than *age*, when the requisite qualifications were found. Many instances might be mentioned of signal services rendered in high stations to the public before the age of 25: The present Mr. Pitt and Lord Bolingbroke were striking instances.

*Id.*

them was (small) & the duration of some at least short."<sup>191</sup> More explicitly:

*Congress* [as constituted in the New Jersey Plan] *is a single Legislature*. Despotism comes on mankind in different shapes. [S]ometimes in an Executive, sometimes in a military, one. Is there no danger of a Legislative despotism? Theory & practice both proclaim it. If the Legislative authority be not restrained, there can be neither liberty nor stability; and it can only be restrained by dividing it within itself, into distinct and independent branches. In a single house there is no check, but the inadequate one, of the virtue & good sense of those who compose it.<sup>192</sup>

And, a bit further on he adds the observation: "In order to controul [sic] the Legislative authority, you must divide it. In order to controul [sic] the Executive you must unite it."<sup>193</sup>

Second, in opposition to those proponents of a strong national government who would have demoted the states or abolished them altogether,

Mr. Wilson observed that by a Nat[ional] Gov[ernment] he did not mean one that would swallow up the State Gov[ernments] as seemed to be wished by some gentlemen. He was tenacious of the idea of preserving the latter. He thought, contrary to the opinion of (Col. Hamilton) that they might (not) only subsist but subsist on friendly terms with the former. They were absolutely necessary for certain purposes which the former could not reach. All large Governments must be subdivided into lesser jurisdictions. [A]s Examples he mentioned Persia, Rome, and particularly the divisions & subdivisions of (England by) Alfred.<sup>194</sup>

<sup>191</sup> *Id.* at 343 (June 20).

<sup>192</sup> *Id.* at 254 (June 16). A few days later Wilson noted the possibility of a divergence between the interests of the people and the interests of their representatives as a reason for preferring direct rather than indirect elections of the House:

Mr. Wilson considered the election of the [first] branch by the people not only as the corner Stone, but as the foundation of the fabric: and that the difference between a mediate and immediate election was immense. The difference was particularly worthy of notice in this respect: that the Legislatures are actuated not merely by the sentiment of the people, but have an official sentiment opposed to that of the Gen[eral] Gov[ernment] and perhaps to that of the people themselves.

*Id.* at 359 (June 21). These remarks elaborated on a point he had made more obliquely the previous day:

A private citizen of a State is indifferent whether power be exercised by the Gen[eral] or State Legislatures, provided it be exercised most for his happiness. His representative has an interest in its being exercised by the body to which he belongs. He will therefore view the National Legis[ature] with the eye of a jealous rival. He observed that the addresses of Cong[ress] to the people at large, had always been better received & produced greater effect, than those made to the Legislatures.

*Id.* at 344 (June 20).

<sup>193</sup> *Id.* at 254 (June 16).

<sup>194</sup> *Id.* at 322–23 (June 19) (footnotes omitted). Wilson's principal declarations in the Convention from which we can infer his conception of the separation of powers and its central importance to his general constitutional theory are to be found in his comments

Although he does not fully develop the point, these two positions appear to have been related in his mind as a means of dividing and restraining the powers of government: his trust in the good sense of the *people* was not matched by an equal trust in their elected *representatives*, and his preferred method for preventing abuses of political power was to divide and check.<sup>195</sup>

(d) *National popular sovereignty*. In the course of these debates over proportional representation, Wilson began to fill in some of the details of his conception of national popular sovereignty. His first important remark on this topic came in response to a speech by Luther Martin, who had said that, on declaring independence, the thirteen colonies had become thirteen independent sovereignties.

Mr. Wilson, could not admit the doctrine that when the Colonies became independent of G[reat] Britain, they became independent also of each other. He read the [D]eclaration of Independence, observing thereon that the *United Colonies* were declared to be free & independent States; and inferring that they were independent, not *Individually* but *Unitedly* and that they were confederated as they were independent, States.<sup>196</sup>

In these remarks from June 19 we see the germ of Wilson's conception that citizenship is primarily a *national* phenomenon—i.e., that there exists a *single* people of the United States, whom the Constitution is to govern—and his related thought that the state governments exist principally as an administrative convenience for furthering the happiness of the (united) American people.<sup>197</sup>

A few days later, when the question was raised again whether the Senate should or should not be appointed by the state legislatures, Wilson parted company from Madison's Virginia Plan and sketched a new conception of *dual citizenship* which complemented his view of the existence of a single American people:

It is improper that the state legislatures should have the power contemplated to be given them. A citizen of America may be considered in two points of view—as a citizen of the general government, and as a citizen of the particular state, in which he may reside. We ought to consider in

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criticizing the Virginia Plan on May 31, *id.* at 47–61, and in his speeches of June 16, *id.* at 249–80, and August 15, 2 CONVENTION RECORDS, *supra* note 24, at 294–302.

195 This underlying idea also lies behind many of his concrete discussions of the powers of the Executive and the Judiciary, and the relations between the states and the national government. In general, Wilson sought to give each of these agencies an authority grounded directly in the people, and then to set them up so that they would find it difficult to abuse their powers.

196 1 CONVENTION RECORDS, *supra* note 24, at 324 (June 19).

197 Hamilton was quick to second these remarks, which form part of a tradition stretching from Wilson, through Hamilton, to John Marshall and Joseph Story, before being given their canonical exposition in the Gettysburg Address.

what character he acts in forming a general government. I am both a citizen of Pennsylvania and of the United States. I must therefore lay aside my state connections and act for the general good of the whole. We must forget our local habits and attachments. The general government should not depend on the state governments. This ought to be a leading distinction between the one and the other . . . .<sup>198</sup>

As with the election of the President, Wilson would have preferred a direct election of the Senate by the people. This was a step that the Convention, including Madison, would never take. And so: “[Mr. Wilson] therefore move[d], *that the second branch of the legislature of the national government be elected by electors chosen by the people of the United States.*”<sup>199</sup> This motion failed even to find a second.<sup>200</sup>

The most bitter phase of the great debate on proportional representation lasted from June 27 to July 16, and it threatened to derail the Convention altogether. For the most part, the arguments of Madison and of Wilson during this period are devoted to the single issue of proportional representation; they echo one another, both in

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198 1 CONVENTION RECORDS, *supra* note 24, at 413 (June 25). This is the version of the speech reported in the notes of Yates. The content is close enough to the version reported by Madison that (in contrast to much of Yates) it is probably trustworthy. The version of this speech reported by Madison is longer and reads as follows:

Mr. Wilson. [T]he question is shall the members of the [second] branch be chosen by the Legislatures of the States? When he considered the amazing extent of country—the immense population which is to fill it, the influence which the Gov[ernment] we are to form will have, not only on the present generation of our people & their multiplied posterity, but on the whole Globe, he was lost in the magnitude of the object. The project of Henry [IV] & (his Statesmen) was but the picture in miniature of the great portrait to be exhibited. He was opposed to an election by the State Legislatures. In explaining his reasons it was necessary to observe the twofold relation in which the people would stand. 1. [A]s Citizens of the Gen[eral] Gov[ernment]. 2. [A]s Citizens of their particular State. The Gen[eral] Gov[ernment] was meant for them in the first capacity; the State Gov[ernments] in the second. Both Gov[ernments] were derived from the people—both meant for the people—both therefore ought to be regulated on the same principles. The same train of ideas which belonged to the relation of the citizens to their State Gov[ernments] were applicable to their relations to the Gen[eral] Gov[ernment] and in forming the latter, we ought to proceed, by abstracting as much as possible from the idea of State Gov[ernments]. With respect to the province & objects of the Gen[eral] Gov[ernment] they should be considered as having no existence. The election of the [second] branch by the Legislatures, will introduce & cherish local interests & local prejudices. The Gen[eral] Gov[ernment] is not an assemblage of States, but of individuals for certain political purposes—it is not meant for the States, but for the individuals composing them: the *individuals* therefore not the *States*, ought to be represented in it: A proportion in this representation can be preserved in the [second] as well as in the [first] branch; and the election can be made by electors chosen by the people for that purpose. He moved an amendment to that effect, which was not seconded.

*Id.* at 405–06 (June 25) (footnotes omitted).

199 *Id.* at 414 (June 25).

200 *Id.* at 406.

the content of their arguments and in the tone of frustration, and do not require extensive commentary. But in the midst of this argument Wilson elaborated significantly upon the underpinnings of his conception of representative democracy. To the threat that the small states might refuse to join the Union if they were not provided with an equal vote in the Senate, he replied on June 30:

He hoped the alarms exceeded their cause, and that they would not abandon a Country to which they were bound by so many strong and endearing ties. But should the deplored event happen, it would neither stagger his sentiments nor his duty. If the minority of the people of America refuse to coalesce with the majority on just and proper principles, if a separation must take place, it could never happen on better grounds. . . . [T]he question will be shall less than [one fourth] of the U[nited] States withdraw themselves from the Union, or shall more than [three quarters] renounce the inherent, indisputable, and unalienable rights of men, in favor of the artificial systems of States. If issue must be joined, it was on this point he would chuse [sic] to join it. . . . Can we forget for whom we are forming a Government? Is it for *men*, or for the imaginary beings called States? . . . Are the people of the three large States more aristocratic than those of the small ones? Whence then the danger of aristocracy from their influence? It is all a mere illusion of names. We talk of States, till we forget what they are composed of.<sup>201</sup>

In this quotation, Wilson sounds a theme to which was to recur often in his subsequent work: that the fundamental unit of politics is the individual human being, and that states are to be seen simply as an instrumental device for promoting their interests. For the next two weeks, the Convention turned itself in circles on the question of proportional voting and debated the proper relationship between representation, taxation, wealth, slavery, and size of population.<sup>202</sup>

The subtlety of Wilson's views can best be seen by contrast with Madison. Where, for Wilson, representation was always about the representation of human individuals, for Madison it was about the representation of interests. In particular, also on June 30, in consid-

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201 *Id.* at 482-83 (June 30).

202 On July 11, Wilson gave his view of the Three-Fifths Clause; namely, that although the principle itself made no sense, it must be accepted as a ground of compromise.

Mr. Wilson did not well see on what principle the admission of blacks in the proportion of three fifths could be explained. Are they admitted as Citizens? Then why are they not admitted on an equality with White Citizens? Are they admitted as property? [T]hen why is not other property admitted into the computation? These were difficulties however which he thought must be overruled by the necessity of compromise.

*Id.* at 587 (July 11). Wilson had helped to introduce the Three-Fifths Clause into the Constitution, taking the percentage from an earlier compromise brokered by Madison in Congress. See *supra* note 21.

ering the rivalries between the North and the South, Madison put forward a striking proposal:

But he contended that the States were divided into different interests not by their difference in size, but by other circumstances; the most material of which resulted partly from climate, but principally from (the effects of) their having or not having slaves. These two causes concurred in forming the great division of interests in the U[nited] States. It did not lie between the large & small States: it lay between the Northern & Southern. [A]nd if any defensive power were necessary, it ought to be mutually given to these two interests. He was so strongly impressed with this important truth that he had been casting about in his mind for some expedient that would answer the purpose. The one which had occurred was that . . . the votes of the States . . . should be represented in one branch according to the number of free inhabitants only; and in the other according to the whole n[umber] counting the slaves as (if) free. By this arrangement the Southern Scale would have the advantage in one House, and the Northern in the other.<sup>203</sup>

As the debates proceeded, many delegates urged that *property* be the basis of representation in at least one chamber. Gouverneur Morris in particular argued repeatedly not only for the representation of property, but for the limitation of the future political power of the Western states, whose voting power he wished to ensure would never exceed that of the maritime states. Morris at times linked these two ideas:

He thought property ought to be taken into the estimate as well as the number of inhabitants. Life and liberty were generally said to be of more value, than property. An accurate view of the matter would nevertheless prove that property was the main object of Society. . . . If property then was the main object of Gov[ernment] certainly it ought to be one measure of the influence due to those who were to be affected by the Governm[ent]. He looked forward also to that range of New States which w[ould] soon be formed in the west. He thought the rule of representation ought to be so fixed as to secure to the Atlantic States a prevalence in the National Councils.<sup>204</sup>

Madison himself was not averse to the idea of a representation of property, and on July 9

[Mr. Madison] suggested as a proper ground of compromise, that in the first branch the States should be represented according to their number of free inhabitants; And in the [second] which had for one of its primary objects the guardianship of property, according to the whole number, including slaves.<sup>205</sup>

<sup>203</sup> 1 CONVENTION RECORDS, *supra* note 24, at 486–87 (June 30) (footnote omitted).

<sup>204</sup> *Id.* at 533 (July 5).

<sup>205</sup> *Id.* at 562 (July 9). The quotation is from Madison's own notes. In another passage concerning property and the basis of representation, Madison said:



The problem with Madison's position becomes clear when we juxtapose it with the position of those like Gouverneur Morris, who wished to limit the voting power of the new Western states. Madison disagreed with Morris on this point. But, having himself proposed different bases of representation in order to accommodate different interests, he was left with no good answer to the question Morris could have posed to him: if you are willing to adopt different principles of representation in order to accommodate the interests of the North and the South, then on what *principled* basis can you refuse to allow the maritime states to protect their voting interests against the new states of the West? Madison's retort to Morris merely consisted in a piece of gentle ridicule: "To reconcile the gentl[eman] with himself it must be imagined that he determined the human character by the points of the compass."<sup>206</sup> But this quip scarcely comes to grips with the underlying theoretical difficulty. A few days later, on July 13, the issue of Western representation again was raised, and Wilson gave a far deeper philosophical justification of his own commitment to proportional representation than any of the delegates at the Convention ever furnished. In the process, he pulled together his views on behalf of the equality of the prospective Western states:

If a general declaration would satisfy any gentleman he had no indisposition to declare his sentiments. Conceiving that all men wherever placed have equal rights and are equally entitled to confidence, he viewed without apprehension the period when a few States should contain the superior number of people. The majority of people wherever found ought in all questions to govern the minority. If the interior Country should acquire this majority they will not only have the right, but will avail themselves of it whether we will or no. This jealousy misled the policy of G. Britain with regard to America. The fatal maxims espoused by her were that the Colonies were growing too fast, and that their growth must be stinted in time. What were the consequences? [F]irst[,] enmity on our part, then actual separation. Like consequences will result on the part of the interior settlements, if like jealousy [and] policy be pursued on ours.<sup>207</sup>

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It was said that Representation & taxation were to go together; that taxation & wealth ought to go together, that population and wealth were not measures of each other. He admitted that in different climates, under different forms of Gov[ernment] and in different stages of civilization the inference was perfectly just. He would admit that in no situation numbers of inhabitants were an accurate measure of wealth. He contended however that in the U[nited] States it was sufficiently so for the object in contemplation.

*Id.* at 585 (July 11).

<sup>206</sup> *Id.* at 584 (July 11).

<sup>207</sup> *Id.* at 605 (July 13).

On this ground he then squarely took aim against the view, propounded at various times by Madison and many others, that voting power should be proportional to wealth:

Again he could not agree that property was the sole or the primary object of Govern[ment] & Society. The cultivation & improvement of the human mind was the most noble object. With respect to this object, as well as to other *personal* rights, numbers were surely the natural & precise measure of Representation. . . . In no point of view however could the establishm[ent] of numbers as the rule of representation in the [first] branch vary his opinion as to the impropriety of letting a vicious principle into the [second] branch.<sup>208</sup>

But these philosophical issues were not the main order of business. Madison and Wilson continued to argue strenuously against the acceptance of the “compromise” that had been reported back by a specially-chosen committee on July 5.<sup>209</sup> The tone of Wilson’s remarks became somewhat sarcastic, and they were punctuated by comments like, “A vice in the [principle of] Representation, like an error in the first concoction, must be followed by disease, convulsions, and finally death itself.”<sup>210</sup> This tone no doubt reflected fatigue, as well as the growing realization that the Convention was leaning in a different direction, and, in fact, it formally adopted the “compromise” on July 16.

### 3. Act I, Part 3. Tuesday, July 17 to Thursday, July 26

Wilson and especially Madison appear to have been shaken by this loss, and Madison appears at least to have contemplated the collapse of the Convention.<sup>211</sup> The next ten days, from July 16 to July 26, were relatively uneventful, and taken up with matters of detail; no doubt the other delegates were exhausted as well. During this time Wilson expressed his opinion on structural matters but not on deep questions of constitutional principle. So, for example, he, with his former opponent Roger Sherman, spoke in favor of granting the national legislature general rather than enumerated powers,<sup>212</sup> opposed the

208 *Id.* at 605–06 (July 13).

209 The compromise was equal state voting in the Senate in return for a provision that money bills must originate in the lower house. *Id.* at 524.

210 2 CONVENTION RECORDS, *supra* note 24, at 10 (July 14).

211 See Madison’s remarks on the meeting on the morning of July 17 of a number of distressed delegates to discuss the steps they ought to take in response to the vote of the day before. *Id.* at 19–20.

212 *Id.* at 26 (July 17). This point should be remembered when we come to his work on the Committee of Detail, since it suggests that the enumeration of powers produced by that Committee did not come at Wilson’s initiative.

election of the President by the legislature;<sup>213</sup> argued that Justices of the Supreme Court ought to be appointed by the President rather than by the legislature;<sup>214</sup> suggested the language guaranteeing the states a "Republican []form of Governm[ent],"<sup>215</sup> argued that judges ought to share in the President's veto power;<sup>216</sup> and at one point—his worst suggestion during the Convention—proposed that the President, if he were to be elected by the legislature, ought to be elected by a small number of legislators chosen by lot.<sup>217</sup>

On July 23, a deeply fatigued Convention, having adopted a large number of resolutions on a complicated variety of issues, and having nearly torn itself apart in the process, decided to appoint a committee to reduce the existing state of the discussion to some sort of systematic order. The language of the resolution adopted by the Convention—"It was moved and seconded that the proceedings of the Convention . . . be referred to a Committee for the purpose of reporting a Constitution conformably to the Proceedings aforesaid"<sup>218</sup>—and the few surviving scattered remarks of the delegates suggest the Committee was viewed as having primarily a clerical function: to tidy things up and produce a text that incorporated the results of the discussions thus far.<sup>219</sup>

The next day, five delegates were elected to the Committee of Detail: Nathaniel Gorham (Massachusetts), Oliver Ellsworth (Connecticut), Edmund Randolph (Virginia), John Rutledge (South Carolina), and James Wilson.<sup>220</sup> Four of the five were lawyers (Gorham, a businessman, being the exception); three of them—Rutledge, Ellsworth, and Wilson—were subsequently to sit on the Supreme Court. The

213 *Id.* at 32 (July 17).

214 *Id.* at 41 (July 18).

215 *Id.* at 48–49 (July 18).

216 *Id.* at 73 (July 21). The motion was seconded by Madison.

217 "This was not he said a digested idea and might be liable to strong objections." *Id.* at 103 (July 24).

218 *Id.* at 85 (July 23).

219 Thus delegate Hugh Williamson wrote to James Iredell on July 22 that "After much labor the Convention have nearly agreed on the principles and outlines of a system, which we hope may fairly be called an *amendment* of the Federal Government. This system we expect will, in three or four days, be referred to a small committee, to be properly dressed . . ." 3 CONVENTION RECORDS, *supra* note 24, at 61. Or again, George Washington noted in his diary for July 27 that the Convention had adjourned for ten days so that a committee "which had been appointed (consisting of 5 Members) might have time to arrange, and draw into method & form the several matters which had been agreed to by the Convention, as a Constitution for the United States." *Id.* at 65.

220 The Convention, contrary to its usual practice, chose not to appoint a delegate from every state. *Id.* at 87 (July 23).

first phase of the Convention came to an end on July 26. At this point, most of the delegates went home for a ten-day break while the Committee of Detail met to prepare its draft of the Constitution.

*D. Act II. The Committee of Detail: July 27 to August 6*

The Committee of Detail is often treated in a cursory manner in histories of the Convention, which tend to focus on the drama surrounding the "Great Compromise." Yet the Committee of Detail, contrary to its instructions, significantly rewrote the Constitution, adding provisions that had never been discussed by the Convention and were ultimately to be of greater importance to constitutional law than the issue of equal state representation in the Senate.<sup>221</sup>

One reason for this lack of attention is the relative absence of documentation. Very little is known about the internal functioning of the Committee. Madison was not present to record its deliberations, and we must reconstruct its work from a sequence of nine drafts, beginning with the proceedings referred to the Committee by the Convention and ending with the Committee's final report. All but one of the documents produced by the Committee is found in the Wilson papers in Philadelphia.<sup>222</sup> The first substantive Committee text, found in the papers of George Mason, is in the hand of Randolph with emendations by Rutledge. The other texts are in Wilson's hand; the final draft is in Wilson's hand with emendations by Rutledge. Wilson was clearly the leading intellect on the Committee and its most skilled lawyer; it is tempting to infer from these facts, and from the handwriting of the drafts, that he was the dominant author of the final report. But there are facts which point in another direction. It was Rutledge, not Wilson, who ultimately presented the

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221 Oliver Ellsworth is reported by his son as having told him in 1802:

He, Judge E[llsworth], told me one day as I was reading a Newspaper to him containing Eulogiums upon the late General Washington, which among other things ascribed to him the founding of the American Government to which Judge Ellsworth objected, saying President Washington's influence while in the Convention was not very great, at least not much as to the forming of the present Constitution of the United States in 1787, which Judge Ellsworth said was drawn by himself and five others, viz—General Alexander Hamilton, Gorham of Mass, deceased, James Wilson of Pennsylvania, Rutledge of South Carolina and Madison of Virginia.

3 CONVENTION RECORDS, *supra* note 24, at 396–97. Ellsworth's list is just the Committee of Detail, with the absence of Randolph, and the addition of Hamilton and Madison. The list needs to be taken with a pinch of salt—Hamilton's part in the framing of the Constitution was relatively minor, as most likely was Gorham's. Ellsworth's memory may have been faulty, or his son may have misreported his words. But the quotation does indicate that Ellsworth saw the work of the Committee of Detail as being of crucial importance to the drafting of the Constitution.

222 2 CONVENTION RECORDS *supra* note 24, at 129, 134, 137, 150, 152, 157, 159 & 163.

Committee's report to the Convention, and the drafts show a number of striking concessions to the slave states that are almost certainly his handiwork. John Rutledge was a shrewd tactician. He was friendly with Wilson, having, as we saw, lodged in his house in the opening days of the Convention.<sup>223</sup> It is highly likely that they consulted together on matters of strategy. Rutledge also struck up a close alliance with several of the smaller Northern states, especially Connecticut, arranging that the delegates from Connecticut would support the position of the deep South on slavery in return for South Carolina's support of Connecticut on issues of trade, navigation, and land claims. A back-room alliance between Connecticut and South Carolina is certain, though the details are necessarily murky. Some historians date it as early as a dinner meeting between Rutledge and Roger Sherman on June 30. Certainly by late August, when Ellsworth and Sherman were vigorously defending the South Carolina position on slavery, it was clear to everybody that a bargain had been struck.<sup>224</sup> Inside the Committee of Detail, therefore, Rutledge almost certainly had powerful allies, and he could count on Ellsworth of Connecticut and Randolph of Virginia to support the position of South Carolina. These likely alliances are facts which we must bear in mind as we proceed through the various drafts produced by the Committee. Although a great deal is hidden from view, it is nevertheless possible, by considering the positions adopted by the various Committee members on the Convention floor, to make some reasonable conjectures about how the work proceeded.

The Committee of Detail's first document, a draft in Randolph's hand with emendations by Rutledge, probably reflects a Rutledge-Randolph-Ellsworth alliance. For starters, it does some tidying up and adds some refinements to the resolutions that had been adopted by the Convention. For example, it cleans up the rules on the organization of the House and Senate, and it introduces such items as the Speech and Debate Clause.<sup>225</sup>

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223 SMITH, *supra* note 4, at 203. Smith characterizes Rutledge as "an intimate friend" of Wilson's.

224 There is a helpful discussion of these matters in FORREST McDONALD, *E PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC, 1776-1790*, at 290-302 (1965). McDonald favors the theory of the June 30 meeting, though his argument has not found general acceptance among historians. It is also unclear exactly what the Connecticut delegation expected in return for its support of South Carolina. But the fact of a deal is evident in particular from the debates of August 22 and August 28; that Madison was aware of it is evident from his footnote to the proceedings of August 29. 2 CONVENTION RECORDS, *supra* note 24, at 449.

225 2 CONVENTION RECORDS, *supra* note 24, at 129-33.

Wilson is unlikely to have objected to these minor reforms. But the Draft also reflects a conception of a powerful Senate. This is in keeping with the vision of the Virginia Plan, which Randolph had introduced at the beginning of the Convention. In the aftermath of the “compromise” of July 16, this was something which the small-state delegates Ellsworth and Rutledge could now support. The Draft in particular gives to the Senate the power to negotiate treaties, appoint ambassadors, and appoint the judiciary.<sup>226</sup> Wilson certainly would have disagreed with giving the Senate these powers, which he repeatedly in the Convention argued should be exercised by the President.<sup>227</sup> The Randolph-Rutledge Draft contains an insertion in Rutledge’s hand providing that state laws repugnant to the Constitution were to be treated as void, and were not to be followed by the national judiciary.<sup>228</sup> It also specified more precisely the jurisdiction of the Supreme Court.<sup>229</sup>

Both of these provisions Wilson would almost certainly have supported, though there is no direct evidence to show that he was their author. But strikingly, the draft inserted three provisions entirely for

<sup>226</sup> *Id.*

<sup>227</sup> Wilson expressed this view both before and after the meetings of the Committee of Detail. See, e.g., 1 CONVENTION RECORDS, *supra* note 24, at 119 (June 5); 2 CONVENTION RECORDS, *supra* note 24, at 538 (Sept. 7).

<sup>228</sup> “All laws of a particular state, repugnant hereto, shall be void, and in the decision thereon, which shall be vested in the supreme judiciary, all incidents without which the general principles cannot be satisfied shall be considered, as involved in the general principle.” 2 CONVENTION RECORDS, *supra* note 24, at 144. I note in passing the awkwardness of the formulation, which is characteristic of Rutledge and of the entire Draft—and which provides at least a minor indication that Wilson may not have been involved in its writing.

<sup>229</sup> The original language of the Convention on this jurisdictional point read as follows: “Resolved[.] That the Jurisdiction of the national Judiciary shall extend to Cases arising under the Laws passed by the general Legislature, and to such other Questions as involve the national Peace and Harmony.” 2 CONVENTION RECORDS, *supra* note 24, at 132–33. The Draft adds considerable detail (the phrases in parentheses were added in Rutledge’s hand):

7. The jurisdiction of the supreme tribunal shall extend 1[.] to all cases, arising under laws passed by the general (Legislature) 2. to impeachments of officers, and 3. to *such* other cases, as the national legislature may assign, as involving the national peace and harmony, in the collection of the revenue, in disputes between citizens of different states, (in disputes between a State [and] a Citizen or Citizens of another State), in disputes between different states; and in disputes, in which subjects or citizens of other countries are concerned (& in Cases of Admiralty Juris[diction])[.] But this supreme jurisdiction shall be appellate only, except in (Cases of Impeachment & (in)) those instances, in which the legislature shall make it original. [A]nd the legislature shall organize it[.]

8. The whole or a part of the jurisdiction aforesaid according to the discretion of the legislature may be assigned to the inferior tribunals, as original tribunals.

*Id.* at 146–47.

the benefit of the South, and especially the deep South. Congress was prohibited from taxing exports; navigation acts would have to be passed by a two-thirds majority; and the slave trade could not be prohibited.<sup>230</sup> These provisions could not have come from Wilson or Gorham. They almost certainly emanated from Rutledge, the most forceful advocate of the position of the Deep South; because they made their way into the final Committee Draft, they must also have enjoyed the support of Randolph and Ellsworth. These provisions elicited a great deal of controversy in the closing weeks of the Convention. They are extremely important for the history of the Convention and for the tensions they reveal between North and South; but they are less important for understanding the thought of Wilson. For that reason, I shall set them aside.

Finally, the Draft introduced an enumeration of eighteen specific powers of the national legislature.<sup>231</sup> The Convention had in the past declined to supply any such enumeration, and it instead had adopted a general grant of powers, which reached the Committee of Detail in the following language:

Resolved[.] That the Legislature of the United States ought to possess the legislative Rights vested in Congress by the Confederation; and moreover to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.<sup>232</sup>

Where did the enumerated powers come from? Most of them were drawn either from the enumeration in the Articles of Confederation, or else from the Pinckney Plan, which the Committee had at its disposal. Who was responsible for introducing them into the Constitution? The issue had arisen several times in the course of the Convention. On May 31, Rutledge objected to the vagueness of the grant of power in the Virginia Plan, and he said that he wanted an exact enumeration of powers. Randolph, too, "disclaimed any intention to give indefinite powers to the national Legislature."<sup>233</sup> As for Madison, "Mr. Madison said [also on May 31] that he had brought with him into the Convention a strong bias in favor of an enumeration and definition of the powers necessary to be exercised by the national Legislature;

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230 *Id.* at 143. "[N]o prohibition on . . . Importations of (such) inhabitants (or People as the sev[eral]) States think proper to admit)" was the specific phraseology; the handwriting in this clause is shared between Randolph and Rutledge.

231 *Id.* at 142–44.

232 *Id.* at 131–32. This language had been adopted by the Convention on July 17. *Id.* at 21.

233 1 CONVENTION RECORDS, *supra* note 24, at 53 (May 31).

but had also brought doubts concerning its practicability. His wishes remained unaltered; but his doubts had become stronger. What his opinion might ultimately be he could not yet tell.”<sup>234</sup> According to the notes of Pierce, Wilson, speaking just before Madison, “observed that it would be impossible to enumerate the powers which the federal Legislature ought to have.”<sup>235</sup> Six weeks later, on July 16, just after the “Great Compromise” had been reached, Rutledge again urged that a specification of powers be provided.<sup>236</sup> On the other side of the issue, Madison had reiterated his position against such a specification on July 7.<sup>237</sup> On July 17, Roger Sherman suggested the Convention not provide an enumeration, but instead adopt the general formula

to make laws binding on the people of the (United) States in all cases (which may concern the common interests of the Union); but not to interfere with (the Government of the individual States in any matters of internal police which respect the Gov[ernment] of such States only, and wherein the General) welfare of the U[nited] States is not concerned.<sup>238</sup>

### 1. *Wilson Seconded His Motion*

From these facts, we can conclude that the specific list of eighteen enumerated powers in the Draft most probably came from Rutledge and Randolph, and not from Wilson. Indeed, of the many striking innovations of this Draft—the enumeration of powers, the protection of the slave trade, the rules on exports and navigation acts, the granting of appointment powers to the Senate, the specification of the jurisdiction of the Supreme Court—all but the last would have been opposed by Wilson, and none clearly bears his fingerprints. It is conceivable that this text in the handwriting of Randolph and Rutledge represents the result of the initial deliberations of the Committee of Detail. But it seems at least equally plausible that it represents only the initial views of Rutledge and Randolph, and it may even have been drafted before the Committee first met.

The succeeding drafts, in contrast, show greater signs of Wilson’s participation. Indeed, the next document (Farrand’s “Draft V”) is entirely in Wilson’s hand. It contains no mention of Rutledge’s pro-Southern provisions concerning exports, the slave trade, and navigation acts; nor does it mention any enumeration of legislative powers

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<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 60. This remark of Wilson’s is not recorded in Madison’s notes.

<sup>236</sup> 2 CONVENTION RECORDS, *supra* note 24, at 17.

<sup>237</sup> 1 CONVENTION RECORDS, *supra* note 24, at 551.

<sup>238</sup> 2 CONVENTION RECORDS, *supra* note 24, at 25 (July 17).



(except to note in passing that the Constitution should “treat of the Powers of the legislative” and “except from those Powers certain specified Cases”).<sup>239</sup> These omissions make it unlikely that Rutledge was involved in the production of this text, and indeed there is no sign of the influence of any member of the Committee other than Wilson. Draft V is in fact little more than a list, an outline of topics to be covered in the Constitution. Its most striking feature is a first sketch of a Preamble: “We The People of the States of New-Hampshire &C do . . . ordain declare and establish the following . . . Frame of Gov[ernmen]t as the Constitution . . . of the said United States.”<sup>240</sup> The opening formula, “We the People,” is of course a thoroughly Wilsonian phrase, and reflects the deepest principle in his constitutional theory, the commitment to popular sovereignty.<sup>241</sup> These first two drafts show little evidence of being a product of deliberations by the full Committee, and may in fact represent nothing more than private jottings by Rutledge/Randolph and Wilson respectively.

The next text (Farrand’s Drafts VI/VIII) is more clearly a collaborative effort.<sup>242</sup> It, too, is in Wilson’s hand, and preserves Wilson’s “We the People” language (and also provides that the new Government is to be called the “United People and States of America”<sup>243</sup>). Draft VI/VIII is still not a complete draft of a Constitution. It does not treat the executive branch, nor the judiciary, nor even all aspects of the legislative branch. Its primary focus is upon the manner of election of the national legislature, and of its internal rules. This

239 2 CONVENTION RECORDS, *supra* note 24, at 151.

240 *Id.* at 150.

241 This opening formula was to survive in the successive drafts of the Constitution, before being altered by the Committee of Style in the final days of the Convention to the familiar “We, the People of the United States . . . .” Compare the versions *id.* at 565 and 590. The change was likely made because, at the conclusion of the Convention, it was unclear whether all the listed states would ultimately ratify the Constitution. But Wilson, with his strongly held view that the Constitution was to govern a single American people, would most likely have preferred the final version to his own earlier draft.

242 I treat these two texts together because Draft VIII is clearly a continuation of Draft VI. Both are in Wilson’s handwriting. Interposed between them, also in Wilson’s hand, but written with a different pen, is Farrand’s “Draft VII,” consisting of excerpts from the Pinckney Plan and the New Jersey Plan. See 2 CONVENTION RECORDS, *supra* note 24, at 157 n.15 (providing Farrand’s description on the different manuscripts).

243 *Id.* at 152. Wilson, like many of the delegates, was thoroughly steeped in the history of the Roman republic, and this phrase was clearly intended to evoke the ancient formula for the Roman state, “the Senate and People of Rome,” abbreviated on coins and public buildings as “SPQR.” This formula was however dropped in Draft IX in favor of the “United States of America.” *Id.* at 163.

Draft contains neither Rutledge's enumeration of powers, nor his three pro-Southern provisions. It introduces several provisions which had already been voted on by the Convention and which Wilson and Rutledge would likely both have approved: a clause guaranteeing to the states a Republican form of Government,<sup>244</sup> clauses specifying the procedures for the ratification of the Constitution and for its amendment,<sup>245</sup> and a clause providing for a presidential veto of congressional legislation.<sup>246</sup> These provisions, with a few deviations, were all broadly in compliance with resolutions previously adopted by the Convention; the Committee filled in details, but did not add anything dramatically new. The Committee also adopted from the Articles of Confederation a cumbersome procedure for resolving disputes between states over territorial boundaries; this provision (which did not survive into the final Constitution) was likely suggested by Wilson, who, unlike the other Committee members, had extensive experience in litigating such territorial disputes.<sup>247</sup>

But Draft VI/VIII also added three novel provisions which had not been approved by the Convention, and which Wilson would almost certainly have resisted or opposed. First, it provided that the States were to specify the time, place, and manner of elections of the national legislature, subject to regulation by Congress.<sup>248</sup> Secondly, it granted to Congress the power to introduce whatever property qualifications for members of either chamber of the national legislature it found expedient.<sup>249</sup> Finally, it provided that the salaries of members of both houses of Congress were to be set and paid by the state legislatures.<sup>250</sup> Wilson might reluctantly have accepted the first of these

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244 *Id.* at 159. The clause is a modest re-working of a similar guarantee in Rutledge's Draft IV, *id.* at 148. A shorter version had earlier been voted upon by the Convention, and was included in the Committee's charge. *Id.* at 133. One significant alteration should be noted. Draft VI/VIII, following in this respect Draft IV, added the proviso that any intervention by the national government under this clause must come on the application of the state legislature. This alteration likely originated with Rutledge.

245 *Id.* at 160.

246 *Id.* 160–62.

247 *Id.* at 160–61. See *supra* note 19 and accompanying text.

248 *Id.* at 153. The Committee in this draft also hesitated between whether the qualifications for electors of the national legislature should be the same as for the largest house of the state legislature, or whether the states should be allowed to set the requirements, subject to a congressional override. *Id.* at 163–64.

249 *Id.* at 155–56.

250 *Id.* at 156. Oddly, Rutledge's Draft IV had originally provided that the wages of Senators should be paid out of the national treasury; but he crossed out this provision in the draft. *Id.* at 142.

provisions because of its inclusion of a Congressional override; but the other two run directly contrary to his core principles.

The third provision is especially significant for the light it sheds on the internal workings of the Committee. The Convention had in fact earlier voted, on June 12, by a vote of 8-3, that the wages of members of the lower house should be paid out of the national treasury.<sup>251</sup> In that vote, Connecticut and South Carolina both voted for payment by the state legislatures. On June 26, this time by a margin of 6-5, the Convention voted that the Senate also be paid out of the national treasury. Again, Connecticut and South Carolina voted on the losing side; and in this second vote, Oliver Ellsworth both introduced and spoke for the losing resolution, which Wilson opposed on the grounds that the Senators would then be entirely the creatures of the state legislatures.<sup>252</sup> In the light of this earlier history, it is hard to resist the conclusion that Rutledge and Ellsworth seized the opportunity to try to reverse their earlier defeat. They must have obtained the support of Randolph or Gorham, since this provision survived into the final draft presented by the Committee to the Convention.<sup>253</sup>

Draft VI/VIII is altogether one of the most remarkable documents of the entire Convention. It incorporates the pro-Southern provisions on navigation, exports, and the slave trade; it assigns powerful new responsibilities to the Senate; it introduces an enumeration (and therefore a limitation) of congressional powers; it grants to the state legislatures several new powers, including the power to set congressional salaries. None of these things had previously been approved by the Convention. And not only is Draft VI/VIII not reflective of earlier votes, but it sometimes even directly contradicts them. It is clear in addition that this astonishing draft departs widely from the views of James Wilson. These innovations all benefit either the slave states, or the small states. In view of the close collaboration evident throughout the Convention between the delegations from South Carolina and Connecticut, Draft VI/VIII likely reflects the ideas of Rutledge and Ellsworth, with Randolph providing the necessary third vote.

If this analysis of the situation is correct, Wilson must have faced a difficult choice. On the one hand, to have dissented openly from the

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251 1 CONVENTION RECORDS, *supra* note 24, at 215-16.

252 *Id.* at 428, 433-34. As Wilson put the point: "In the present case, the states may say, although I appoint you for six years, yet if you are against the state, your table will be unprovided. Is this the way you are to erect an independent government?" *Id.* at 434. (This quotation occurs in the notes by Yates; but here there is no reason to suspect any inaccuracy.)

253 2 CONVENTION RECORDS, *supra* note 24, at 180 (Aug. 6).

final Committee report would have re-opened the antagonisms of the preceding weeks, and possibly destroyed the ability of the Convention to reach agreement on a Constitution.<sup>254</sup> On the other hand, Wilson did not have the votes in Committee to reverse Rutledge's innovations, and he must also have seen that several of them could most likely in due course be overturned in Convention. We do not know exactly what negotiations occurred between Wilson and Rutledge after this Draft, but the next document, Draft IX, contains several highly significant additions which bring the final product closer to Wilson's views. (Draft IX is also in Wilson's hand, with some insertions by Rutledge. It is a reasonable conjecture that Wilson prepared a working draft for the Committee; that Rutledge, sitting as the Committee chairman, read it aloud to the assembled members, and inserted the Committee changes in his own hand as they were voted upon.) First, at the end of the enumeration of congressional powers, it introduces the "necessary and proper" clause.<sup>255</sup> Wilson, as a result of his litigation involving the powers of the Confederation Congress to charter a national bank, was fully aware of the power of such a provision, and his earlier arguments concerning the constitutionality of the bank foreshadow the use Hamilton and Marshall would eventually make of this clause. Secondly, Draft IX introduces, to counter-balance the tacit restriction of the powers of Congress to the enumerated powers, an enumeration of activities that are forbidden to the states: this is the core of what eventually became Article I, § 10. Thirdly, the draft introduces the Supremacy Clause. The Convention and the Rutledge draft had specified that the Constitution was to be supreme over the "respective Laws of the individual States"<sup>256</sup> But Draft IX makes the crucial addition: "any Thing in the *Constitutions* or Laws of the several states to the Contrary notwithstanding."<sup>257</sup> On the balance of the evidence, these three insertions appear to represent Wilson's price for agreeing to the less palatable provisions intro-

254 I note in passing that, in the final days of the Convention, the delegates faced great pressure, despite their individual reservations about the Constitution, to give it their public support. There was great effort to try to achieve the appearance of unanimity, and the few non-signers afterwards seem to have been regarded by their fellow delegates as having in a certain measure betrayed the Convention. These pressures for unanimity were greater in the 18th century than they are today; and they would have been felt by the members of the Committee of Detail as well as within the Convention as a whole.

255 2 CONVENTION RECORDS, *supra* note 24, at 168. The clause was carried over almost unchanged into succeeding versions of the Constitution. *See id.* at 182 & 656.

256 *Id.* at 132. *See also id.* at 144 & 148 (providing further support for the Constitution's supremacy over state laws).

257 *Id.* at 169 (emphasis added).

duced in earlier drafts by Rutledge and his allies. If so, Wilson made a good bargain: for the Convention ultimately preserved his innovations, while rejecting most of Rutledge's. In addition, this Draft contains (as an insertion in Rutledge's hand) an early version of the Privileges and Immunities Clause, and the notation "Full Faith & Credit &c," which the Committee later worked up into the Full Faith and Credit Clause.<sup>258</sup> Whether these last insertions originated with Wilson or with Rutledge is unclear; but on these provisions the two men are likely to have agreed.

This final handwritten text is essentially the draft of the Constitution presented by the Committee to the Convention on Monday, August 6. On August 5, some sixty copies were printed by a printer named Dunlop for the use of the delegates.<sup>259</sup> This printed text contained one significant further addition: the first version of the Treason Clause.<sup>260</sup> Because treason had been a special concern of Wilson's since his unsuccessful defense of accused loyalists and Quakers during the war, this clause most likely represents his handiwork.

The internal workings of the Committee of Detail are not recorded in Madison's *Notes*, and its contribution is generally treated only sketchily in histories of the Convention.<sup>261</sup> But the Committee did far more than merely organize the work of the other delegates. It substantially rewrote fundamental parts of the Constitution, and, in the end, its work was to be of greater importance to the structure of American government than all the bitter arguments over proportional representation in the Senate that had consumed most of the month of July. In addition to a host of lesser details, the Committee worked out the very core of American federalism. It provided the first detailed description of the jurisdictional reach of the national courts, together with an enumeration of national legislative powers, balanced by the "necessary and proper" clause, a list of restrictions on

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258 These clauses in Draft IX appear in *id.* at 174. The worked-up version in the final Committee report is found in *id.* at 187–88.

259 See *id.* at 175.

260 *Id.* at 182. Treason had earlier been mentioned almost in passing, *id.* at 168, but this Committee report adds considerable detail. The ultimate version is to be found at 2 CONVENTION RECORDS, *supra* note 24, at 661.

261 A pair of examples from two leading studies of the Convention will illustrate the point. Max Farrand devotes a chapter of his monograph to the work of the Committee, but does not attempt to analyze in any detail the contributions of the various members, and in particular does not notice the tensions between the contributions of Wilson and of Rutledge. FARRAND, *supra* note 1, at 124–33. Clinton Rossiter's monograph disposes of the Committee in less than two pages, and is even less concerned to seek a close analysis of its internal deliberations. ROSSITER, *supra* note 1, at 200–02.

the powers of the states, and the Supremacy Clause. Beyond that, the sixty printed copies of its report were to structure the debates throughout the remainder of the Convention: the Virginia Plan receded further and further into the background.<sup>262</sup> Although it is impossible to know the precise nature of the negotiations that took place within the Committee, Wilson and Rutledge were unquestionably the two dominant figures in organizing these fundamental features of the Constitution.

*E. Act III. After the Committee of Detail: August 6 to September 17*

The Committee of Detail presented its Report to the full Convention on August 6. The basic structure of a Constitution had now been committed to paper; indeed, the Committee Draft was nearly three times the length of the resolutions that had been submitted to it by the Convention ten days earlier. From this point forward the deliberations took on a different character than they had possessed in June and July, and the Committee Report was to provide the organization and the starting-point for all the future discussions. What remained was to proceed through the document clause by clause, adjusting the details and debating the proposed changes. The speeches of the delegates tend to be shorter than in previous months, and also less philosophical. There are fewer displays of abstract learning, fewer appeals to broad principle, and more haggling over the precise wording of concrete terms. In addition, the Convention now made much heavier use of committees, committing difficult issues to smaller groups of delegates for resolution. This practice makes it somewhat harder to follow the chronological flow of events, since several of these committees could be active at the same time.

Wilson during this month took the opportunity on several occasions to urge the full Convention to reverse several of the more objectionable contributions of the Committee of Detail—a fact which suggests that while serving on the Committee he acquiesced in Rutledge's innovations only for tactical reasons. The issue of property qualifications for members of Congress was the first of these innovations to be discussed, on August 10. Rutledge and Ellsworth spoke in favor of allowing Congress to set property qualifications; Madison argued that any such qualifications should be set, not by the

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262 Numerous copies of this printed text survive in the papers of various delegates, often with extensive marginal notes; for a discussion and representative selections. See SUPPLEMENT, *supra* note 60, at 207–12.

legislature, but by the Constitution itself. It was Wilson who successfully proposed eliminating property qualifications altogether.<sup>263</sup>

The next objectionable innovation, discussed on August 14, was the proposal that the salaries of members of Congress be set and paid by the state legislatures. This idea had twice before been rejected by the Convention, and Wilson did not spend much time attacking it.<sup>264</sup> Indeed, no member of the Committee of Detail spoke in its favor, and Oliver Ellsworth, in a change of heart, now explicitly spoke against it. It was easily defeated, 9-2.

These matters having been disposed of, the Convention then turned its attention to more fundamental matters, and proceeded to the issue of federalism. In a series of votes, they ratified the core elements of the proposal on legislative powers that had been worked out by Wilson and Rutledge. From August 16 until August 20 the Convention discussed the list of enumerated congressional powers: it accepted most, rejected a few, and added a few others to the list; but nobody now questioned the idea of an enumeration. The list of powers prohibited to the states was likewise approved, with some minor adjustments, on August 28.<sup>265</sup> The "necessary and proper" clause was adopted unanimously on August 20, and the Supremacy Clause on August 23.<sup>266</sup> On August 24, the Convention briefly discussed the Committee's adoption of a cumbersome procedure of the Articles of Confederation for resolving territorial disputes between states; on the

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263 It seems likely that Wilson would have argued this matter at some length, but Madison records only that "Mr. Wilson thought it would be best on the whole to let the Section go out. A uniform rule would probably be never fixed by the Legislature. [A]nd this particular power would constructively exclude every other power of regulating qualifications." 2 CONVENTION RECORDS, *supra* note 24, at 251 (Aug. 10). It should be noted that the brevity of the speeches during August may reflect Madison's fatigue with his self-imposed task, rather than an actual reduction in the amount of speech-making. Wilson's motion carried, 7-3. The entire discussion of property qualifications appears in *id.* at 248-51. Madison's own position is complex; on August 7 he had expressed his support for limiting the electorate to freeholders, at least for one chamber of the national legislature. *Id.* at 203-04. (Incidentally, on August 11 Madison and Rutledge proposed a motion that would allow the Senate to conceal parts of its proceedings that it judged required secrecy. Wilson responded that this "would be very improper. The people have a right to know what their Agents are doing or have done, and it should not be in the option of the Legislature to conceal their proceedings." *Id.* at 259-60. Wilson lost the vote, 6-4-1.)

264 Earlier in the day, Wilson expressed the view that this provision on salaries would contribute to a "prostrat[ing]" of the national legislature to the states. *Id.* at 288. He left it to Dickinson and others to oppose the provision directly. *Id.* at 290-93.

265 *Id.* at 439-44.

266 *Id.* at 344-45, 389. Rutledge proposed some slight stylistic changes to the Supremacy Clause, which were accepted; both clauses passed unanimously.

suggestion of Rutledge and of Wilson, this provision was struck out altogether, in favor of vesting jurisdiction over such disputes in the federal courts.<sup>267</sup> With these decisions, the Convention had adopted, with remarkably little fanfare, the core of the system of legislative federalism as it had been worked out in the Report of the Committee of Detail. I note that Madison's contributions to these discussions were comparatively modest, and came primarily in the form of subsidiary suggestions and comments.

Chronologically overlapping with these discussions of federalism was a rancorous argument over the three pro-Southern provisions Rutledge had inserted into the Draft: the prohibition on export taxes, the two-thirds requirement for navigation laws, and the protection of the slave trade. Here, again, Wilson broke with Rutledge. On August 16 and again on August 21, he strongly criticized the prohibition on taxes on exports (a position in which he was joined by Madison).<sup>268</sup> And on August 22, in response to Roger Sherman, who argued in favor of the entire Rutledge package on the grounds that slavery would eventually disappear of its own accord, Wilson

observed that if S[outh] C[arolina] & Georgia were themselves disposed to get rid of the importation of slaves in a short time as had been suggested, they would never refuse to Unite because the importation might be prohibited. As the Section now stands all articles imported are to be taxed. Slaves alone are exempt. This is in fact a bounty on that article.<sup>269</sup>

After a bitter day of argument on August 21, the Convention had handed the entire package of provisions to an eleven-member committee. On August 25 and 29 this committee reported back the essence of the compromise that ultimately found its way into the Constitution: the South would drop the two-thirds majority requirement for navigation acts, and accept that slave imports could be taxed; in return, the slave trade was to be protected for a period of years.<sup>270</sup> Although Madison served on the committee, neither he nor Wilson played a significant role in this bargain, which pitted the states of New England and the states of the Deep South against Virginia and the middle states. On August 25, delegates from South Carolina and Massachusetts moved to extend the protection of the slave trade from twelve years to twenty. Madison spoke against the extension, and the delegations of Virginia and Pennsylvania both voted against it, as did

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<sup>267</sup> *Id.* at 400–01.

<sup>268</sup> *Id.* at 307, 362. See also *id.* at 306 (demonstrating Madison's agreement on this issue).

<sup>269</sup> *Id.* at 372.

<sup>270</sup> *Id.* at 400, 414–17, 449–54.



New Jersey and Delaware; but they were overwhelmed by the alliance, 7-4.<sup>271</sup> On August 28, Pierce Butler proposed the addition of a fugitive slave law; Wilson protested that this would compel the executive in free states to enforce the law at public expense.<sup>272</sup> Butler withdrew his motion, but the bargain between New England and the Deep South was now clear to everyone, and the next day the Convention voted unanimously to eliminate the two-thirds requirement for navigation acts, and to adopt Butler's fugitive slave provision.<sup>273</sup>

Interspersed among these votes were a number of unrelated matters in which Wilson and Madison were more directly involved, and in which, despite their best efforts, they were firmly rebuffed by the Convention. On August 15, Madison, seconded by Wilson, sought to revive Wilson's earlier idea that the President and the Supreme Court should together, in a "Council of revision," wield the veto power over congressional legislation. This was a pet idea of Wilson's. He had first introduced it on June 4, and again on June 6, when it was defeated, 8-3.<sup>274</sup> He and Madison raised the issue a third time on July 21, and, after a lengthy discussion, were again defeated, 3-4-2.<sup>275</sup> The proposal is important for the light it sheds on Wilson's and Madison's conception of the judiciary, and in particular the power of judicial review. During the lengthy debate of July 21, Wilson said:

The Judiciary ought to have an opportunity of remonstrating ag[ain]st projected encroachments on the people as well as on themselves. It had been said that the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the Judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature.<sup>276</sup>

271 *Id.* at 415-16. Whether Madison or Wilson would also have voted against the original Committee recommendation that the slave trade be protected for only twelve years is unclear.

272 *Id.* at 443.

273 *Id.* at 449-54.

274 1 CONVENTION RECORDS, *supra* note 24, at 94, 108, 110 (June 4); *id.* at 138-40 (June 6).

275 2 CONVENTION RECORDS, *supra* note 24, at 73-74, 80.

276 *Id.* at 73. Madison, on the same occasion, noted that such a Council of Revision would not only strengthen the executive, but

would be useful to the Legislature by the valuable assistance it would give in preserving a consistency, conciseness, perspicuity & technical propriety in the laws, qualities peculiarly necessary; & yet shamefully wanting in our republican Codes. It would moreover be useful to the Community at large as an additional check

Wilson, who feared that the legislature would overwhelm the executive, sought through this proposal to bolster the veto power of the President; and it is worthwhile to note that not only did he take it for granted that, even in the absence of this veto power, the Supreme Court would have the authority to declare laws unconstitutional, but he wished explicitly to permit the Supreme Court to overrule laws that were constitutional but “unwise.” But these arguments by the two leading thinkers at the Convention failed to persuade the other delegates. On August 15, Madison and Wilson raised the proposal for the fourth time, and lost again, this time 8-3.<sup>277</sup>

On August 23, the Convention dealt the final blow to a second pet idea, this time Madison’s: the proposal to give Congress an absolute veto over any law passed by a state legislature. Madison had proposed this idea in his correspondence before the start of the Philadelphia Convention, and had included it as a key element of the Virginia Plan. He and Wilson argued for it on June 8, but were rebuffed, 7-3.<sup>278</sup> Madison praised the idea at length on June 19 in the course of his reply to the New Jersey Plan,<sup>279</sup> then lost a second vote on July 17.<sup>280</sup> The idea was raised for a third time on August 23. Wilson spoke in favor:

[He] considered this as the key-stone wanted to compleat [sic] the wide arch of Government we are raising. The power of self-defense had been urged as necessary for the State Governments—It was equally necessary for the General Government. The firmness of Judges is not of itself sufficient. Something further is requisite—It will be better to prevent the passage of an improper law, than to declare it void when passed.<sup>281</sup>

Rutledge responded that, “If nothing else, this alone would damn and ought to damn the Constitution.”<sup>282</sup> The motion again failed, and Madison continued to grumble until the very end of the Conven-

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ag[ainst] a pursuit of those unwise & unjust measures which constituted so great a portion of our calamities.

*Id.* at 74.

<sup>277</sup> *Id.* at 298. A month later, on August 27, when the Convention was making some minor adjustments to the provision specifying the jurisdiction of the national courts, Madison appeared to waver on the issue of judicial review.

Mr Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department.

*Id.* at 430.

<sup>278</sup> 1 CONVENTION RECORDS, *supra* note 24, at 164–69.

<sup>279</sup> *Id.* at 318–19.

<sup>280</sup> 2 CONVENTION RECORDS, *supra* note 24, at 27–28; this vote was also 7-3.

<sup>281</sup> *Id.* at 391.

<sup>282</sup> *Id.*

tion, and even afterwards.<sup>283</sup> Although this was a cherished proposal of Madison's, and although Wilson steadfastly supported him, it is difficult to believe that the Constitution could have been ratified by all thirteen states if they had had their way: at any rate the struggle would have been more intense. So, at least to this extent, Rutledge had a point.

Three other miscellaneous issues that arose in the closing weeks of the Convention deserve to be noticed briefly for the light they shed on Wilson's broader views:

(1) *Citizenship*. On several occasions between August 8 and August 13 the question of citizenship requirements for members of the House and Senate was debated. The most revealing exchange occurred on August 9, when Gouverneur Morris moved for a fourteen-year citizenship requirement for Senators, "urging the danger of admitting strangers into our public Councils."<sup>284</sup> Madison and Franklin both vigorously opposed Morris's motion. Wilson's position is easy to predict: he routinely opposed any restriction on the freedom of choice of the electorate; but on this occasion he interjected a rare personal note:

Mr. Wilson said he rose with feelings which were perhaps peculiar; mentioning the circumstance of his not being a native, and the possibility, if the ideas of some gentlemen should be pursued, of his being incapacitated from holding a place under the very Constitution which he had shared in the trust of making. He remarked the illiberal complexion which the motion would give to the System, & the effect which a good system would have in inviting meritorious foreigners among us, and the discouragement & mortification they must feel from the degrading discrimination, now proposed. He had himself experienced this mortification. On his removal into Maryland, he found himself, from defect of residence, under certain legal incapacities, which never ceased to produce chagrin, although he assuredly did not desire & would not have accepted the offices to which they related. To be appointed to a place maybe matter of indifference. To be incapable of being appointed, is a circumstance grating, and mortifying.<sup>285</sup>

283 See, e.g., *id.* at 440 (Aug. 28); *id.* at 589 (Sept. 12); Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *reprinted in* 3 CONVENTION RECORDS, *supra* note 24, at 131-36 (discussing at length the national veto).

284 *Id.* at 235.

285 2 CONVENTION RECORDS, *supra* note 24, at 237 (Aug. 9). A similar debate took place concerning citizenship requirements for the House of Representatives. *Id.* at 267-72. On that occasion,

Mr. Wilson[] Cited Pennsylv[ania] as a proof of the advantage of encouraging emigrations. It was perhaps the youngest (except Georgia) settle[ment] on the Atlantic; yet it was at least among the foremost in population & prosperity. He remarked that almost all the Gen[eral] officers of (the) Pen[sylvania] line (of the

(2) *Ratification*. On August 30 to 31, the Convention debated the mechanics of ratification of the Constitution. If the procedures for amending the Articles of Confederation were to be followed, Congress would have to be involved, and the states would have to agree unanimously. Wilson favored instead a ratification by only seven states,<sup>286</sup> and opposed the involvement of Congress.<sup>287</sup> He justified this deviation from the existing procedures by an appeal directly to the will of the people, who were themselves superior to Congress: "We must he said in this case go to the original powers of Society. The House on fire must be extinguished, without a scrupulous regard to ordinary rights."<sup>288</sup>

(3) *Full Faith and Credit*. On August 29, the Convention re-committed to the Committee of Detail the Full Faith and Credit Clause for further refinement. The Committee reported back on September 1, and the details were briefly discussed on September 3. From the discussion in Convention, it appears that Wilson was regarded as the chief authority on this clause.<sup>289</sup>

However, these are relatively minor matters. One final large and contentious issue remained to be resolved. On August 24, the Convention discussed the recommendations of the Committee of Detail concerning the Presidency. Recall the background. As we have seen, Madison's Virginia Plan had specified almost nothing about the Executive, except that it was to be appointed by the national legislature, and was not be eligible for a second term. Madison himself, early in the proceedings, at times seemed to favor a plural executive, or an executive during good behavior, or an executive holding office for a lengthy term of seven years.<sup>290</sup> Wilson, in contrast, argued from the start that the President should be a single person, elected for a relatively short term, eligible for re-election, and wielding, in addition to a veto power, the power to make treaties and to make appointments.

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late army) were foreigners. And no complaint had ever been made against their fidelity or merit. Three of her deputies to the Convention (Mr. R. Morris, Mr. Fitzsimmons, & himself) were also not natives.

*Id.* at 269.

286 2 CONVENTION RECORDS, *supra* note 24, at 468 (Aug. 30); the following day, Wilson acceded to a more complex plan advanced by Madison, *id.* at 476–77.

287 *Id.* at 562 (Sept. 10).

288 *Id.* at 469 (Aug. 30).

289 *Id.* at 447–48 (Aug. 29), 488–89 (Sept. 3). The Committee of Detail continued to meet throughout August, and various proposals were committed to it by the Convention (for example, on August 18 and August 20), but these proposals typically expired in committee.

290 Madison's principal remarks on these topics were made on June 1. 1 CONVENTION RECORDS, *supra* note 24, at 68–71.

Most importantly, Wilson favored making the authority of the President entirely independent both of the national legislature and of the governments of the states—either through a direct popular election, or, as a fallback, through the indirect mechanism of an electoral college. In essence, the Virginia Plan was a scheme for legislative governance; Wilson's, a plan for a division and balancing of governmental powers.

The plan submitted by the Committee of Detail, as reported on August 6, was closer to Madison than to Wilson. It provided for a single President, who was to be elected for a seven-year term, and not to be re-eligible. It assigned to the Senate, not to the President, the power to make appointments of judges and ambassadors, and to enter into treaties. Impeachments were to be brought by the House of Representatives, and tried before the Supreme Court. Most importantly, as in Madison's original plan, the President was to be elected by Congress. So it was still in essence a formula for legislative government.

The Convention discussed these proposals on August 24, but without reaching any resolution. The arguments went in circles. Rutledge favored election by Congress, but others disagreed. Wilson's idea of an election by the people was re-considered, and quickly voted down.<sup>291</sup> Madison then supported a motion by Rutledge that the election of the President be by a joint ballot of Congress; this motion carried. Gouverneur Morris then attacked the very idea of an election by Congress, and sought to revive instead Wilson's alternative scheme of an electoral college; the Convention vote on his motion was a tie. The frustrated delegates, having failed to reach agreement, turned their attention to other matters. They briefly discussed impeachment on August 27, and then, on Friday, August 31, turned over the entire business of the Presidency along with other "parts of the Constitution as have been postponed" to a Committee.<sup>292</sup> This Committee, whose chairman was David Brearley, contained eleven members, of whom Madison, Gouverneur Morris, and John Dickinson were the most prominent. It delivered its report to the Convention four days later, on September 4. We know even less about the internal workings of this Committee than we do of the Committee of Detail. But there is reason to believe that John Dickinson, Wilson's former mentor and close associate, played a crucial role

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291 2 CONVENTION RECORDS, *supra* note 24, at 402. Virginia voted in the negative.

292 *Id.* at 481 (Aug. 31).

in persuading the Committee to adopt Wilson's idea of an indirect election via an electoral college.<sup>293</sup>

But the Committee Report of September 4 incorporated far more than Wilson's idea of an electoral college. It also provided for a four-year term of office; that the President should be re-eligible; that he should have the power, with the advice and consent of the Senate, to make treaties and to appoint judges and ambassadors.<sup>294</sup> This committee report thus, in the closing days of the Convention, adopted almost in its entirety the conception of the Presidency that Wilson had been urging on a reluctant Convention since the early days of June.

But there was one final point to be cleared up. In case the Electoral College did not produce a clear winner—a situation Wilson and most other delegates assumed would be the usual outcome—the Senate was to elect the President from among the top five contenders.

293 As Dickinson related the story in a letter to George Logan dated January 16, 1802:

I was the Member from Delaware. One morning the Committee met in the Library Room of the State House, and went upon the Business. I was much indisposed during the whole Time of the Convention. I did not come in to the Committee till late, and found the members upon their feet.

When I came in, they were pleased to read to Me their Minutes, containing a Report to this purpose, if I remember rightly—that the President should be chosen by the Legislature. The particulars I forget.

I observed, that the Powers which we had agreed to invest in the President, were so many and so great, that I did not think, the people would be willing to deposit them with him, unless they themselves would be more immediately concerned in his Election—that from what had passed in Convention respecting the Magnitude and accumulation of those powers, We might easily judge what Impressions might be made on the Public Mind, unfavorable to the Constitution we were framing—that if this single Article should be rejected, the whole would be lost, and the States would have to work to go over again under vast Disadvantages—that the only true and safe Principle on which these powers could be committed to an Individual, was—that he should be in a strict sense of the Expression, *the Man of the People*—besides, that an Election by the Legislature, would form an improper Dependence and Connection.

Having thus expressed my sentiments, Gouverneur Morris immediately said—'Come, Gentlemen, let us sit down again, and converse further on this subject.' We then all sat down, and after some conference, James Maddison [sic] took a Pen and Paper, and sketched out a Mode for Electing the President agreeable to the present provision. To this we assented and reported accordingly. These two Gentlemen, I daresay, recollect these Circumstances.

The letter is reprinted in SUPPLEMENT, *supra* note 60, at 300–02. Dickinson's previous remarks on the Presidency are somewhat scanty, and occur principally on June 2, 1 CONVENTION RECORDS, *supra* note 24, at 85–87, and July 25, 2 CONVENTION RECORDS, *supra* note 24, at 114. Already by the latter date he had embraced one of the central elements of Wilson's conception, saying that he "had long leaned towards an election by the people which he regarded as the best and purest source."

294 2 CONVENTION RECORDS, *supra* note 24, at 496–99. The Report also created the office of Vice President, and provided that the Senate, rather than the Supreme Court, was to try impeachments.

Wilson saw a serious problem with this concentration of powers in the Senate. He pointed it out on September 4, and moved unsuccessfully on September 5 that the deciding vote should go to the entire Congress, and not to the Senate alone. On September 6 he returned to the onslaught:

Mr. Wilson said that he had weighed carefully the report of the Committee for remodeling the constitution of the Executive; and on combining it with other parts of the plan, he was obliged to consider the whole as having a dangerous tendency to aristocracy; as throwing a dangerous power into the hands of the Senate, [t]hey will have in fact, the appointment of the President, and through his dependence on them, a virtual appointment to offices; among others the offices of the Judiciary Department. They are to make Treaties; and they are to try all impeachments. It allowing them thus to make the Executive & Judiciary appointments, to be the Court of impeachments, and to make Treaties which are to be laws of the land, the Legislative, Executive & Judiciary powers are all blended in one branch of the Government. The power of making Treaties involves the case of subsidies, and here as an additional evil, foreign influences to be dreaded—According to the plan as it now stands, the President will not be the man of the people as he ought to be, but the Minion of the Senate. He cannot even appoint a tide-waiter without the Senate . . . Upon the whole, he thought the new mode of appointing the President, with some amendments, a valuable improvement; but he could never agree to purchase it at the price of the ensuing parts of the Report, nor befriend a system of Which they make a part.<sup>295</sup>

Wilson's speech had its intended effect, and later in the day (on a motion of Roger Sherman) the Convention voted to transfer the power to select the President in case of an Electoral College deadlock from the Senate to the House of Representatives. Wilson on the next day continued his criticisms of the Senate, moving (this time unsuccessfully) to require the consent of the House as well as the Senate to treaties, to remove the two-thirds vote requirement for the ratification of treaties in the Senate, and to remove the Senate from the appointment of justices of the Supreme Court.<sup>296</sup>

Madison, as we have seen, entered the Convention in May hoping to make the Senate the most powerful branch of American government. The great defeat of proportional representation on July 16 left his plan in tatters, though as late as August 24 he still favored election of the President by the national legislature. He did not respond to the issues raised by Wilson's speech on the Senate; but the adoption of the Wilson model of the Presidency represented the Convention's

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<sup>295</sup> *Id.* at 522–23 (Sept. 6).

<sup>296</sup> *Id.* at 538–40.

final rejection of his hopes for Senatorial dominance, and the adoption of Wilson's idea of divided government. In the end, even the Virginia delegation voted in favor of all the crucial elements of the Wilson plan.

#### IV. CONCLUSION

Let us now attempt to pull together the principal threads of the argument. I have been attempting to assess the standard view that sees Wilson's role at the Constitutional Convention principally as an adjunct to James Madison. This view received its canonical formulation early in the twentieth century in the influential writings of Max Farrand, and has been the scholarly orthodoxy ever since. Farrand's analysis, we have seen, is strictly and narrowly true only if we confine our attention to the issue that consumed so much of the time of the Convention, and that nearly caused its collapse: the controversy between the large and the small states over the issue of proportional representation in the Senate. If, like most commentators, one views the Convention primarily through Madison's eyes, this argument comes to seem the most important dispute of the summer. Madison, the principal architect of the Virginia Plan, was fervently engaged in arguing the case for proportional representation; indeed, he was in the forefront of the argument, and he could count on the strong support of James Wilson throughout the great debate of June 27 to July 16. In these arguments, Madison displayed (as far as can be judged from his own *Notes*) a greater coolness of temper than did Wilson, and greater skill in legislative tactics; he also (perhaps relatedly) displayed less inclination to speculate about the theoretical underpinnings of the principle of proportional representation. In the end, of course, the arguments of Madison and of Wilson did not persuade the Convention; but for this aspect of the summer's work Farrand's assessment is substantially correct.

However, our examination of the detailed interaction between Madison and Wilson has suggested that, to assess their contributions correctly, we need to shift our attention in two important and related respects: first, by considering other aspects of constitutional design than the controversy between the large and the small states; and, secondly, by recognizing that Madison's political thought was not a monolith, but underwent important developments between the spring of 1787, when he was preparing for the Convention, and the late fall, when he commenced work on *The Federalist*. When we shift our attention in this way, the contrasts between Madison and Wilson become more complicated, and Wilson's role in the drafting of the



Constitution, and his influence on the thought of Madison, becomes more subtle and important than is commonly recognized. It will be helpful if we organize the contrasts into three levels of increasing generality.

1. The first level is the level of concrete institutional design—that is, the ideas of Wilson and Madison about how the fundamental components of American government were to be put together, and how they were supposed to function in practice.

(a) In the architecture of the *executive branch*, as we have seen, Madison (as he explicitly acknowledged) entered the Philadelphia Convention with extremely sketchy ideas. The Virginia Plan provided that the Executive was to be chosen by the national Legislature, and, in concert with the judicial branch, was to have a veto over national legislation; but Madison did not specify how many Executives there were to be, nor the term of office, nor the precise powers of the Executive, nor the conditions under which it could be removed from power. In this area, Wilson unquestionably enjoyed his greatest success. While Madison flirted with and then discarded a variety of ideas—a President for life, a privy council, a prohibition on re-election—Wilson, from the first week of the Convention until its end, argued consistently and ultimately successfully for the structure that eventually emerged: a single President, elected for a relatively short term, eligible for re-election, wielding a veto power, and enjoying authority independently both of the Congress and of the legislatures of the states. Wilson himself favored direct popular election of the President, but proposed the electoral college as a second-best procedure for securing at least an indirect popular authority; and although he, too, occasionally advocated some questionable positions (such as giving the President an absolute veto, or allowing the veto to be exercised conjointly with the judiciary), he, more than any other delegate, was the principal architect of the executive branch. This was a remarkable accomplishment, especially when one considers that in the opening days of the summer Wilson stood almost alone; but his persistent and emphatic arguments ultimately swayed the other delegates, including Madison, to his side. In this area, at least, the view of Wilson as “Madison’s ablest supporter” is untenable, as is the view that he was a clumsy parliamentary tactician.

(b) The construction of the *judicial branch* occupied relatively little of the Convention’s time, but here, too, Wilson played a central role. When on June 5, the Convention eliminated the lower federal courts from the Constitution, it was Wilson, seconded by Madison, who argued for allowing Congress the discretion to create such

courts, thereby radically affecting the development of American law. And, where Madison was somewhat vague about the question of federal jurisdiction, we have seen that there is reason to believe that the core of the modern formula—federal jurisdiction in cases of diversity and of federal questions—emerged from Committee of Detail. As a result of his work on *Olmstead* and on the Wyoming Valley litigation, Wilson came to Philadelphia with more experience of federal-state and state-state litigation than any other delegate; and although the inner workings of the Committee of Detail are hidden from view, Wilson, as the most experienced lawyer on the Committee, is the likeliest to have crafted these particular provisions.

(c) The construction of the *legislative* branch divides into two parts. The democratic character of the *lower* branch was never seriously called into question during the Convention, and on this institutional matter there are no important differences between Wilson and Madison. The composition and nature of the Senate is a different matter. Madison and Wilson agreed completely on the “large state” position that the Senate should be elected on a principle of proportional representation, and they reliably supported one another during the heated arguments of early July. But in contrast to the executive and the judiciary, the Senate was a matter to which Madison had given considerable thought, and it played a different and more central role in his conception of constitutional government than it did in Wilson’s. It is here that Madison was most completely in his element, and in the debates about the structure and powers of the Senate Wilson tended, on the whole, to follow Madison’s lead, especially in the weeks before the “Great Compromise” of July 16.

(d) The system of *federalism* that emerged from the Convention bears essentially no relationship to Madison’s ideas of state-federal relations as depicted in the Virginia Plan. Madison’s core idea, to which he clung even after the final document had been signed, was an absolute Congressional veto on any act of the state legislatures whatsoever. It was the Committee of Detail that produced the principal elements of the existing system—the delegation and enumeration of federal legislative powers, the jurisdictional demarcation of the powers of the federal courts, the “necessary and proper” clause, and the Supremacy Clause. This system appears to have been largely the handiwork of Wilson and Rutledge, with no involvement at all from Madison.

In other words, we have seen that, when we shift our attention to consider constitutional design *as a whole*, we are forced to modify if not to abandon the picture of Wilson as merely an assistant to Madi-

son. That picture is correct, if anywhere, only within the context of the debates about proportional representation in the Senate; but it does not accurately reflect Wilson's and Madison's respective contributions to the judicial branch, and is positively erroneous when we consider their contributions to the design of the Executive, or to the system of federalism.<sup>297</sup>

This last point can be strengthened. I noted above the tendency of scholars to read the Convention through Madison's eyes, and in particular through his meticulous *Notes*. If one looks at matters in this way, then the fight over proportional representation is thrown into prominence. Not only was it the issue that most threatened to derail the proceedings, but it was theoretically central to Madison's entire scheme for a suitably "filtered" Senate. So it is not surprising that he should have given the arguments on this issue great emphasis. In addition, he was not a member of the Committee of Detail; and so in his *Notes* the contributions of that Committee necessarily recede into the background. But if we step back and ask, what are the features of the American system of government that today most importantly distinguish it from other modern systems of constitutional democracy, the composition of the Senate seems an unlikely candidate. As things have evolved, the issue over which the delegates clashed so bitterly in 1787 is today likely to seem, even to critics, a relatively minor blemish, a deviation from the strict democratic principle of "one-person-one-vote." But the system of federalism and the system of separation of powers are considerably more fundamental. The

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297 As for the view that Wilson (in Farrand's words) was "not as adaptable and not as practical" as Madison, this contrast appears to be more a matter of style than substance. Our examination has turned up few cases where either Madison or Wilson put forward proposals that in retrospect appear either foolish or unworkable. And when they advocated measures that are open to serious criticism (as with the electoral college, or the Three-Fifths Clause), they did so less from conviction than from a desire to achieve a compromise within the Convention. Perhaps Madison's national veto, which Wilson supported, falls into the category of foolish ideas; but from the perspective of 1787 it must have seemed an ingenious way to control the legislative excesses of the states. Wilson's personal style comes across in the *Notes* as more flamboyant and more combative than that of Madison. He was likelier to exchange barbs with the representatives of the small states, and likelier to try to overwhelm his opponents with his arguments. He tended to speak first, and vigorously, and in defense of a specific position. Madison, in contrast, is more cautious, more scholarly, at times more subtle. He would often wait until all the other speakers had exhausted themselves on an issue, then present a concise and insightful summary of the various arguments, together with his own carefully-formulated proposal. This style was doubtless more effective as a technique of persuasion than Wilson's somewhat rougher approach; and in this sense at least it is possible to agree with Farrand that Madison was the more formidable legislative tactician.

American system of federalism, with its complex articulation of interlocking powers assigned to the national and state governments, is unique among modern constitutional democracies. Furthermore, most constitutional democracies today are *parliamentary* democracies, with the legislative branch paramount, and a Prime Minister ultimately answerable to Parliament. The Virginia Plan, too, proposed a system of essentially legislative government, with an Executive appointed by Congress; and until the very end of the Convention, a system of legislative government seemed the likeliest outcome. It was only on September 6, when the Convention adopted the core of Wilson's conception of the Presidency, that the familiar system of divided and balanced federal powers finally entered the Constitution.

2. However, the differences between Madison and Wilson become even more significant and more revealing when we turn from the specific details of institutional architecture, and consider instead the reasoning that lies in the background—that is, when we turn to the realm of constitutional theory.

Our survey has revealed that, although Wilson and Madison tended to vote together on the institutional details, they did so for subtly different reasons. Roughly speaking, Madison entered the convention with a conception of constitutional government that rested upon the idea of “successive filtrations” that would culminate in a powerful, stable, and virtuous Senate. The Senate—the central institution in the national government—would then wield the power to strike down any act of a state legislature that it considered unwise. It was largely because Madison's Senate was to have such power that it needed to be elected on a principle of proportional representation: otherwise the scheme would never be acceptable to the large states, and in particular would never be ratified by Virginia. Wilson, in contrast, pinned his hopes on popular sovereignty, on a consistent principle of one-person-one-vote, and on a functional separation of competencies between the various actors in the constitutional scheme. The failure of proportional representation was therefore for Madison a severe defeat, and left his senatorial plan in tatters; it is for this reason that in mid-July he seems to have considered leaving the Convention, and that his letters in the weeks immediately after its close betray a mood of disappointment. For Wilson, on the other hand, the defeat, although real, was only partial. Even after the vote on July 16 he continued to press the twin themes of direct popular sovereignty and of separation of powers; and there are signs, especially in the later discussions of the executive branch, that Madison gradually migrated to his view.

3. But these differences in the realm of constitutional theory can themselves be traced to deeper and more abstract themes in political and legal philosophy; and it is here that Wilson emerges most fully into his own. Again, the point can be brought out most clearly by a comparison with Madison. We have seen, for example, that Madison proposes a different mechanism for the selection of the upper and lower branches of the legislature; but he never squarely and systematically addresses the underlying philosophical questions: Precisely what is the Senate supposed to represent? And why is the principle of proportional representation a requirement of political justice? Nor does he ever explicitly answer Wilson's question: "Can we forget for whom we are forming a government? Is it for men, or for the imaginary beings called states?" Madison wavers: sometimes the Senate is supposed to represent the interests of "the opulent portion of society"; sometimes the interests of the states; and sometimes it seems to be simply a device to achieve greater legislative stability and wisdom. But it should be clear even from the secondhand and abbreviated accounts of Wilson's speeches at the Convention that he had thought deeply about these philosophical issues, and that he sought to apply consistently, throughout the Convention, a deep and radical conception of human equality, which he outlines most explicitly in his remarks of July 13. This conception of equality in turn underpins his conception of proportional representation; his rejection of property qualifications; his attitude towards immigration and the rights of future generations; his attitude towards the states as merely "imaginary beings"; his conception of national citizenship; and his advocacy of radical popular sovereignty as the ultimate foundation for American democracy. For Wilson, all the branches of government, federal as well as state, the Senate and the President as well as the House of Representatives are alike supposed to represent, not property, nor states, but the people, considered as a collection of free and equal human individuals.

I said earlier that an outside observer, called upon to predict Wilson's behavior at the Constitutional convention, would have expected him to support the interests of the Philadelphia business elite into which he was so firmly embedded—to seek to limit the franchise, to oppose the power of the radical Westerners, to protect the interests of property, and to cabin the power of the people. Wilson instead confounded expectations on all of these points, and emerged as the Convention's most radical and consistent advocate of the principle of popular sovereignty. Of course, only hints of his deeper views can be gleaned from the brief accounts we have of his speeches at the Con-

vention itself; but they are adequate to reveal that we are dealing with a political thinker of exceptional depth and perception and originality. In this Article, for methodological reasons, I have focused my attention exclusively on his activities at the Convention, and have refrained from attempting any detailed analysis of the philosophical underpinnings of his views. This technique seemed best suited to bringing out exactly what he contributed, in institutional terms, at the Convention. But despite these limitations, it should be clear that Wilson was not only one of the major architects of the American Constitution, but a powerful thinker with a distinctive set of legal and political and philosophical preoccupations. These facts should indicate that his *Lectures on Law*, where he presented his philosophical views at the greatest length, are ripe for a fresh study.